

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

National Association of Independent
Television Producers and Distributors,
Petitioner,

v.

Federal Communications Commission and
the United States of America,
Respondents.

CBS Inc. and National Broadcasting Company,
Inc.,
Intervenors.

Warner Bros. Inc., Columbia Pictures Industries,
Inc., MGM Television, United Artists Corporation,
MCA, Inc., and Twentieth Century-Fox Television,
Petitioners,

v.

Federal Communications Commission and
the United States of America,
Respondents.

National Committee of Independent Television
Producers and Lorimar Prods.,
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Sandy Frank Programs Sales, Inc.,
Petitioner,

v.

Federal Communications Commission and
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American Broadcasting Companies, Inc.,
Intervenor.

Westinghouse Broadcasting Company, Inc.,
Petitioner,

v.

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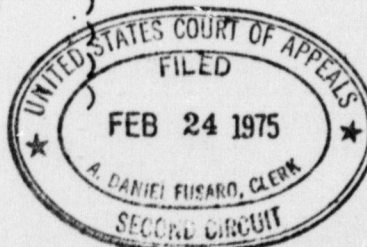
75-4021

Case No. 75-4021

Case No. 75-4024

Case No. 75-4025

Case No. 75-4026



ON PETITION FOR REVIEW OF A REPORT AND ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR THE PETITIONER
SANDY FRANK PROGRAM SALES, INC.

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BRIEF FOR THE PETITIONER
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AGENCY DECISION BELOW

The decision of the Federal Communications Commission here sought to be reviewed is the Second Report and Order adopted by the Commission in its Docket No. 19622 on January 16, 1975 and released on January 17, 1975 (FCC 75-67, 40 F.R. 4001). (A. 084).

QUESTIONS PRESENTED

In May, 1970, the Commission adopted regulations, generally called the Prime Time Access Rule (PTAR), to reduce the dominance of the three commercial television networks over nighttime television programming and to create opportunities for the development of alternate sources of such programming. To that end, the Commission cleared one hour per night on each network affiliated station in the Top 50 markets and prohibited the carriage therein of network programs, off-network reruns, or certain feature films. On appeal, this Court affirmed its action.

Shortly after the original rule (PTAR I) became fully effective, the Commission instituted a new proceeding to reconsider it. In January, 1974 the Commission drastically

revised the rule and sharply cut back the time periods originally opened up for the non-network program suppliers. The revised rule (PTAR II) was appealed to this Court, which held that the Commission had acted too precipitously in trying to make the changes effective in September, 1974. The Court therefore enjoined the agency from making PTAR II effective prior to September, 1975 and, while it did not order further proceedings, suggested that the Commission might give further consideration to a number of issues.

The Commission issued an order inviting additional comments and thereafter, on January 16, 1975, adopted a further revision of the rule (PTAR III) which reinstates most of PTAR I but engrafts on it certain exceptions which would permit network affiliated stations to fill some part of the cleared access time with network or off-network programs of three types: (1) Childrens programs, (2) public affairs programs, and (3) documentaries. The Commission ruled that these changes should be effective in September, 1975 and refused to announce that it would maintain the rule as thus revised (PTAR III) in effect for a sufficient period to provide a measure of stability to the access period production and syndication industries, as suggested by the Department of Justice and others.

The questions presented by this Petition for Review are:

I. Was the Commission's curtailment of the Prime

Time Access Rule arbitrary and capricious in view of the fact that the record before it demonstrated that the Rule had substantially achieved the agency's objectives in adopting it and contained no showing that the conditions which led to the adoption of the Rule had been otherwise remedied?

- (A) Was the Commission's authorization of the use of certain off-network programs in the access period arbitrary and capricious because not supported by the record?
- (B) Was the Commission's authorization of the use of certain network programs in the access period arbitrary and capricious because, on the record, any need for such programming could be met within the networks' much more substantial portion of prime time, without impairing the achievement of the objectives of the Prime Time Access Rule, and because such action departed from the reliance on local licensee responsibility which is basic to the scheme of the Communications Act and to established Commission policy?
- (C) Was the Commission's authorization of the carriage in access time of certain favored

categories of network and off-network programs unlawful because the categories were not defined precisely enough, so that this exception from the basic rule will involve the Commission in continuing decisions as to individual programs in violation of the First Amendment and Section 326 of the Communications Act?

- II. Was the Commission's adoption of modifications of the Prime Time Access Rule which effected a compromise among the private interests of some of the parties to the proceeding, but ignored the public interest as reflected in the comments of the public groups whose views the Court suggested should be solicited, arbitrary and capricious?
- III. Was the Commission's refusal to lend needed stability to the access period production and syndication industries by announcing that the revised Rule would be retained for a period of five years, as suggested by the Department of Justice, arbitrary and capricious?
- IV. Was the Commission's order arbitrary and capricious, on the record made below, in directing that the revised Rule should go into effect on September 8, 1975?

SUMMARY OF ARGUMENT

PTAR I has substantially achieved its objectives, which the Commission still finds valid and worth pursuing. The Commission, in this third round look at the problem of network dominance and the need for developing alternate sources of prime time programming, properly reaffirmed those objectives and announced that it "has decided to return to PTAR I." (A. 092).

However, the Commission then engrafted exceptions onto the Rule, producing PTAR III. While this is a much better rule than PTAR III, which was adopted by the Commission on January 23, 1974 and was before this Court in National Association of Independent Television Producers and Directors v. FCC, 502 F.2d 249 (CA2 - 1974)--these modifications are not supported by the record, are not rationally explained as required by law, and depart from the underlying regulatory pattern for broadcasting provided in the Communications Act. The Commission's action in adopting these changes was therefore arbitrary and capricious.

The exceptions in question permit the presentation, in access time, of network or off-network children's programming, public affairs programming, or documentaries. This means that the very limited access time periods which, the record shows, must be preserved in order to hold network dominance in check and to support a viable alternative program production industry can be invaded, either by the networks'

presenting programs in these three categories, or by stations' presenting off-network reruns in these categories.

The authorization of the use of any off-network reruns was arbitrary and capricious. The Commission said, in its 1970 Order adopting PTAR I, that to permit the use of off-network programs "would destroy the essential purpose of the rule to open the market to first run syndicated programs." This Court quoted this statement approvingly in affirming the Commission's action in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, at 484 (1971). There has been nothing in the record of this proceeding to weaken or controvert that conclusion. If there are attractive off-network programs in the Commission's three favored categories, there are other portions of station time in which they can be presented. The record contains no showing of any need for the presentation of such programs in access time which could outweigh the need to preserve the access period in order to foster the objectives of PTAR I.

Similarly, the authorization to the networks to present children's, public affairs, and documentary programming in access time was arbitrary and capricious. If there is any need for the networks to present such programming--and a case for that proposition has not been made on the record--that need can, and should, be met by the networks in their own share of prime time. They have 75% of the prime evening hours--and the best 75% at that. They have the greatest

resources in the television industry. If they believe--or the Commission concludes on a proper record--that the public interest requires more programming in these categories, the networks can accommodate that need without imperiling the objectives of PTAR I by invading access time.

The Commission has concluded that there is a special problem with respect to children's programming. It says it has received complaints that the networks schedule children's specials--generally in the holiday season--at 8:00 p.m. which is too late for children. Frank agrees that such programs should be presented earlier, at 7:30 or even 7:00 p.m.--but there is nothing in PTAR I which prevents the networks from doing so. The rule does not establish 8:00 to 11:00 p.m. as network prime time--the networks simply chose the later three quarters of the evening because larger audiences are available then. On Sunday they now begin their program block at 7:30 p.m., so that access time on Sundays is 7:00 to 7:30 and 10:30 to 11:00 p.m. So on any night the networks desire to present children's programs, they should simply advance their starting time and turn the last hour or half hour of prime time over to the access producers and syndicators.

But the Commission has said they can move their starting time forward to accommodate children's bedtimes--and also keep the 8:00 to 11:00 p.m. period they now occupy so profitably! There is absolutely no basis in the record for this treatment of the problem--and no logical explanation for the Commission's

conclusion. This obviously increases network dominance over prime time programming in direct contravention of the basic purpose of PTAR I. This serves the networks' interest but not the public interest.

This will also defeat PTAR I's effort to establish an alternate access program market. NBC has already said that it will move The Wonderful World of Disney--which the Commission unaccountably designated as the only program now in prime time which qualifies for the children's exemption--from 7:30 p.m. to 7:00 p.m. on Sundays. This means that ABC and CBS will have to present similar "children's" programs starting at 7:00 p.m. on Sundays. That step, alone, will reduce the critically important access time periods by 14%. If the networks and significant numbers of stations present other programs in the children's, public affairs, or documentary categories, this will still further erode the base necessary to support a viable access program industry.

In addition, the Commission's definitions of "children's programs" and "documentary programs" are so imprecisely drawn that stations and syndicators of off-network programs can't tell exactly what is permitted. This will involve a much greater invasion of access time than the Commission intends, as the owners of rerun series persuade stations that programs with children in them qualify for the exemption, or that any mildly informational non-fictional program is a documentary and therefore entitled to preferred treatment.

This will result in a rash of disputes which will be referred to the Commission. The latter will thus be drawn into deciding that this program qualifies, but that one doesn't--a classic case of censorship and prior licensing of speech which violates Section 326 of the Communications Act and the First Amendment.

And even if the Commission eventually tightens its definitions and holds the line against still greater erosion of access time, the damage will have been done. The disputes over the meaning of the exemptions will so disrupt the market for access programming that those producer/syndicators now operating on the margin will be driven to the wall. The hopes for a strong and growing alternative program industry will thereby be delayed.

Despite this Court's holding in National Association of Television Producers and Directors v. FCC, supra, that the Commission may not simply compromise the interests of the private parties to this proceeding, but must reach a result in terms of the public interest, the Commission has again reached a result that is explainable only in terms of an accommodation of conflicting private interests.

At the suggestion of the Court, the Commission did solicit the views of a number of public groups. Some twenty-two responded, all but one urging retention of the full provisions of the original PTAR I and several suggesting strengthening of the Rule. The Commission appears to have

acquiesced to the extent of returning, at least nominally, to PTAR I. But it has seriously undercut the effectiveness of the Rule by the exceptions referred to above, which it has adopted in disregard of the views of the public groups and the Department of Justice.

It has not adequately justified this result, which can only be explained as an attempt to reduce the already limited access period in the interest of the networks and of the entities which own the distribution rights to off-network rerun programs. On the record, there is no basis for finding this to be in the public interest since any such programming which the networks or their affiliated stations should present to serve that interest can and should be accommodated in the networks' 75% of prime time or in other station time.

The Commission also acted arbitrarily and capriciously in refusing to indicate that the Rule, however it may be revised, will be left in effect for five years in order to lend much needed stability to the struggling access production and syndication industries. Normally no such assurance is necessary or appropriate, but PTAR I has been subjected to constant attack ever since its adoption--including public statements by the former chairman of the Commission--and has been subject to review looking toward its modification or possible repeal ever since it went fully into effect.

Even the Commission concedes that the Rule has not

had a fair test due, in part, to "the unfavorable climate which has prevailed, due to the uncertainty as to the rule's future." (PTAR II, Par. 89). A number of the private parties urged the Commission to give the access program industry a breathing spell, and some stability to allow it to establish itself and grow, by announcing that it would not further modify the rule for a period of five years. The Department of Justice agreed, saying that "the prime time access rule was never given an opportunity to work" and recommending "that the Commission restore the original prime time access rule as initially formulated and that it accompany this action with an announcement that it intends to let the rule remain in effect for a suitable period, perhaps five years." The Commission arbitrarily rejected this request without adequate justification.

The Commission further acted arbitrarily and capriciously in directing that PTAR III be made effective on September 8, 1975. This Court, in National Association of Television Producers and Distributors v. FCC, supra, enjoined the Commission from enforcing PTAR II prior to September, 1975--the agency having tried to make its rule modifications effective September 1, 1974. The Court pointed out that when the Commission adopted PTAR I in 1970 it gave the networks sixteen months to phase out their syndication activities and also allowed sixteen months before making PTAR I itself effective. It therefore held that: "The longer grace period permitted the networks to cushion the adverse impact of the

original rule should also have been granted the independents in this case."

The Court then remanded the case "to permit the Commission to specify precisely what the effective date should be." It also postponed consideration of the merits of the petitions then before it and suggested that the Commission might "choose to utilize the additional time available to it to reconsider its changes in the rule." If the Commission had rejected that suggestion and had immediately notified the interested parties that it still intended to implement PTAR II, it would have had to allow sixteen months from the date of the Court's decision, since the entire status of PTAR was up in the air until the Court ruled--as it has been virtually from its inception. Sixteen months from June 18, 1974, when the Court released its decision, would have been October 18, 1975, rather than September 8, 1975.

But the Commission did not follow that course. Instead, it issued a Further Notice Inviting Comments. Comments and reply comments were received from a substantial number of parties, the replies being filed on October 10, 1974. On November 15, 1974 the Commission issued a news release entitled "Commission Issues Staff Instructions in Prime Time Access Proceeding." This was the first official intimation of the possible direction the Commission's new decision might take, but was not, of course, a formal decision. That notice indicated that the Commission planned to make its proposed modifications of the Rule effective September 1, 1975. However,

sixteen months from that date would be March 15, 1976 and not September 8, 1975.

But such notices, in Commission practice, are preliminary and subject to change. Frank and other parties made efforts to persuade the Commission to modify the course of action indicated in the November 15, 1974 news release, and were advised that the matter was still under consideration, with a number of matters still in dispute--including the question of the effective date.

The Commission did not release its formal PTAR III Order until January 17, 1975. Sixteen months from that date--which is when the parties were first formally advised of the future shape of the Commission's policy with respect to prime time access--will be May 7, 1976, not September 8, 1975.

There is thus no way in which the Commission could make its PTAR III revisions effective on September 8, 1975 and still comply with this Court's ruling on the prior appeal. In addition, Frank and others have made it clear on the record that the schedule for planning new program offerings for the Fall 1975 television season, making tentative arrangements for production, and launching marketing efforts required the expenditure of time and money and the making of commitments prior to January 17, 1975 when the Commission's formal order was released. The agency's effort to ram its revisions of the Rule down the throats of affected parties with respect to the Fall 1975 television season was therefore arbitrary and capricious.

STATEMENT OF THE CASE

This proceeding involves four separate petitions seeking review of a Report and Order of the Federal Communications Commission which revised, in several respects, Section 73.658(k) of its Rules, commonly known as the Prime Time Access Rule (PTAR). Three of these petitions have been filed by proponents of PTAR who complain that the Commission has improperly curtailed its effectiveness. The fourth petition was filed by the major motion picture producers (Warner Bros. et al.) who have always opposed PTAR, because it reduced the amount of prime time controlled by the networks and largely programmed by these interests, and here continue to seek its elimination. CBS, which has always opposed PTAR, has intervened in Case No. 75-4021 for the purpose of overturning the Rule. ABC, which has always supported PTAR, and NBC, which originally opposed the Rule but later came to support it, have intervened in Case No. 75-4025 and Case No. 75-4021, respectively, apparently to support the Commission's latest revision of the Rule.

PTAR I--A Strong Move Toward Competition

The original Prime Time Access Rule (PTAR I) was adopted in May, 1970 after a comprehensive inquiry and a protracted rulemaking proceeding. The inquiry was begun by the Commission in 1959 "to determine the policies and practices pursued by networks and others in the acquisition, ownership,

production, distribution, selection, sale and licensing of programs for televised exhibition, and the reasons and necessity in the public interest for said policies and practices."^{1/} Public hearings were held in New York, Los Angeles, and Washington at which all major components of the television industry were heard at length. From these proceedings the Commission's Network Study Staff concluded, and reported to the Commission, that the responsibility for programming in television had become unduly concentrated in the three commercial networks and, correlativity, had been almost completely delegated to them by their licensed affiliates contrary to the intent of the Communications Act and the stated policies of the Commission.^{2/}

On March 22, 1965, as an outgrowth of that investigation and still within the framework of Docket No. 12782, the Commission instituted a formal rulemaking proceeding looking toward the adoption of rules intended to multiply competitive sources of television programming.^{3/} After five years spent in compiling several series of written comments and in hearing oral argument, the Commission concluded that "an unhealthy situation" existed in national television broadcasting because

^{1/} Order for Investigatory Proceeding, Docket No. 12782 (FCC 59-166), adopted February 26, 1959.

^{2/} "Responsibility For Broadcast Matter", Interim Report by the Office of Network Study, June 15, 1960, and "Television Network Program Procurement", Second Interim Report by the Office of Network Study (Part I), November 28, 1962--both reprinted in House Report No. 281, 88th Congress, 1st Session (1963); and "Television Network Program Procurement", Second Interim Report (Part II), July 2, 1965, FCC.

^{3/} FCC 65-227, 30 F.R. 4065.

"only three organizations control access to the crucial prime time evening schedule." The Commission therefore adopted PTAR I,^{4/} which excluded network programs, off-network reruns, and certain feature films from "access time", which was to be one hour out of the 7:00 to 11:00 p.m. prime time block^{5/} on stations owned by or affiliated with the networks in the Top 50 markets. The May 4, 1970 order also adopted, as parts of the same package, so-called financial interest and syndication rules (Section 73.658(j) of the Commission's Rules) which barred the networks from acquiring financial interests in programs produced by others and from syndicating programs in the United States (foreign syndication is allowed with respect to programs solely produced by the networks). These collateral rules, which are not involved here, were deemed necessary to prevent indirect circumvention of PTAR I.

The objective of PTAR I was summarized as follows in the order adopting it:

The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming. Existing practices and structure combined have centralized control and virtually eliminated needed sources of mass appeal programs competitive with network offerings in prime time. To remedy these

^{4/} Report and Order in Docket No. 12782 (In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting), adopted May 4, 1970, 23 FCC2d 382; slightly modified on reconsideration, 25 FCC2d 318 (1970).

^{5/} All times used herein will be Eastern Time. The Rule defines prime time as 7-11 p.m. Eastern and Pacific Time, 6-10 p.m. Central and Mountain Time.

problems, we have decided first to open access directly to the top 50 markets for independent programming by prohibiting network affiliates in these markets where there are at least three commercial television stations from taking more than 3 hours of network programs between 7 p.m. and 11 p.m. with certain exceptions for programs whose duration is not under network control (certain live sports events), those in the news area as to which the network cannot plan in advance (e.g., on-the-spot coverage of bona fide news events; a special news program on a fast-breaking news event such as the recent Apollo mission), and political broadcasts by legally qualified candidates for public office. In view of the common practice of the networks of offering only 3 1/2 hours of network programs between 7 p.m. - 11 p.m., the rule we are adopting will open up one-half hour of additional time per evening for nonnetwork programs on affiliated stations. Off-network programs may not be inserted in place of the excluded network programming; to permit this would destroy the essential purpose of the rule to open the market to first run syndicated programs. We have also dealt with feature film in this respect, because if the network affiliates were to adopt the general practice of substituting feature film for network fare as a means of meeting the requirements of our rules, it would frustrate the purpose of the rule. We have therefore also proscribed the use of feature film which has been previously broadcast in the market . . . (Footnotes omitted) 6/

The Commission described this as a "modest action" which it expected to provide:

. . . a healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and, indeed, affiliated) stations. The entire development of UHF should be benefited.^{37/} It may also be hoped that diversity of program ideas may be encouraged by removing the three-network funnel for this half hour of programming.

37/ If this half hour is used for local programming instead of syndicated entertainment, this would also serve the public interest. 7/

6/ 23 FCC2d 382, at 394-395.

7/ Id. at 395.

The networks, MCA, Inc., and a number of broadcast stations appealed the Commission's order. This Court sustained its action in Mt. Mansfield Television v. FCC, 442 F.2d 470 (1971). PTAR I was scheduled to go into effect some four months later on September 1, 1971. However, in acting on petitions for reconsideration, the Commission had deferred implementation of the ban on off-network reruns until October 1, 1972.

PTAR II--Virtual Abandonment Of The Rule

On October 26, 1972--just twenty-five days after PTAR I became fully effective--the Commission instituted a new proceeding, Docket No. 19622, "In the Matter of Consideration of the operation of, and possible changes in, the prime time access rule, Section 73.658(k) of the Commission's Rules."^{8/} This was designed to explore whether PTAR I should be rescinded or retained--and, if the latter, what modifications should be made in it. On January 23, 1974 the Commission adopted a Report and Order, which it released on February 6, 1974 and which drastically revised the rule and sharply cut back the access time periods which had been cleared for the non-network program suppliers.^{9/} This was PTAR II, although the Commission tried to retitle it "Evening programming requirements," and the changes were to be effective in September, 1974.

^{8/} 37 FCC2d 900, 37 F.R. 23349.

^{9/} FCC 74-80, 44 FCC2d 1081.

PTAR II would have cut access time to just one half hour Monday through Friday; would have virtually repealed the Rule on Saturday and Sunday, returning that time to the networks; would have barred feature films completely from access time; would have announced the Commission's expectation that some of the limited time still cleared would be used by stations for programs related to minority affairs, children's programs, or other programs directed to the needs of the station's community; and would have made changes to deal with sports runovers, time zone differences, and situations, like the Summer Olympics, where a network devotes all of its prime time to special programming.

This Court's Decision Of June 18, 1974

However, PTAR II never became formally effective^{10/} because of this Court's ruling on appeals taken by the National Association of Independent Television Producers and Distributors (NAITPD) and Westinghouse Broadcasting Company, Inc. (Westinghouse). The Court denied NAITPD's request for stay--which Petitioner, Sandy Frank Program Sales, Inc. (Frank), supported as an amicus curiae--but later ruled that the Commission had acted too precipitously in trying to make PTAR II effective in September 1974. It noted that when

^{10/} However, the announcement of the rule changes at a critical point in the development of programs for the Fall 1974 television season, when this Court denied a stay, had a serious immediate impact on access producers and syndicators.

PTAR I was promulgated in 1970 the networks had been given sixteen months in which to make the necessary adjustments and held that the same lead time should have been given to the independent access producers. The Court therefore enjoined the Commission from making PTAR II effective prior to September, 1975. It did not pass on the merits of the petitions for review but dismissed them without prejudice to their being brought anew after the Commission had an opportunity to conduct such further proceedings as it might deem appropriate in the light of some suggestions made by the Court in its opinion.^{11/}

Implementing The Decision--The Commission's
Further Notice

In light of this Court's decision, the Commission issued a Further Notice Inviting Comments in Docket No. 19622 on July 17, 1974 (FCC 74-756), 39 F.R. 26918. A substantial number of comments and reply comments were filed, by parties who had previously participated and by some parties new to the proceedings.

Thus this Court, in discussing the importance of the competitive aspects of the questions at issue in Docket No. 19622, said:

. . . It is clear, however, that the nation's policy favoring competition is one which the FCC must incorporate in regulating the broadcast media. FCC

^{11/} National Association of Independent Television Producers and Distributors v. FCC, 502 F.2d 249 (CA2, June 18, 1974).

v. RCA Communications, Inc., 346 U.S. 87, 94 (1953); National Broadcasting Co. v. United States, 319 U.S. 190, 218 (1943); cf. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940). It would seem that the views of the Department of Justice as to the impact of proposed rule modifications on competition would be relevant to the Commission's deliberations. Yet the Commission does not indicate that the Department participated in the proceedings, see Report, Appendix B, 44 FCC2d at ___, and its discussion of the effect of PTAR on network dominance makes no reference to the views of the Department. Again, our review could be facilitated if the Commission solicited and evaluated the views of the Department on this issue.^{12/}

The Commission, by letter dated July 19, 1974, did solicit the views of the Department of Justice "on the effect of the rule, and of the modifications which our January decision [PTAR II] made in it, in terms of network dominance and competition." The Department responded, reviewing the developments leading to PTAR I and pointing out that it had advised the Commission that the Rule would be in accord with the objectives of the antitrust laws and could be an important first step in developing diverse, independent program sources, thereby curtailing network program control. But the Department pointed out that the Rule "never had a chance to become a stable element in the broadcast regulation environment." It noted this Court's reference to suggestions that overall network power has been strengthened by the Rule, but said that the "empirical evidence now available does not seem entitled to great weight in the present circumstances, since the prime time access rule has never been given an opportunity

^{12/} Id. at 256-257.

to work." It concluded by saying:

The Department, accordingly, recommends that the Commission restore the original prime time access rule as initially formulated and that it accompany this action with an announcement that it intends to let the rule remain in effect for a suitable period, perhaps five years.

Thus the government's expert agency with respect to competition and concentration of economic power has come down firmly in favor of reverting to PTAR I and giving it a fair test to see if it can achieve the worthy objectives for which it was adopted. (A. 079)

This Court, in its decision of June 18, 1974, noted that the Commission had not had the benefit of many public groups, but had largely considered the views of "the two major warring groups who are petitioners here." It recalled that: "The Supreme Court has repeatedly stressed the primacy of the interests of the viewing public in the FCC's exercise of its powers." It said that the courts have held that, in circumstances such as are involved here, "the FCC and other federal agencies must listen to the views of groups representing various segments of the public before taking action."^{13/}

The Commission did invite the views of consumer, minority, and other public groups. Some seventeen such entities replied, representing large segments of the public of widely varied geographic and demographic composition. Except for the National Retired Teachers Association, which echoed the arguments of the major film producers, all of these groups

^{13/} Id. at 257.

uniformly support PTAR I, or an even stronger rule, as the only sure means by which local interests and minority groups can be seen and heard on television. While of course differing in detail, these comments all support PTAR I, the rule in its original form, or urge amendments to enhance its ability to foster community oriented television programming and licensee autonomy and responsibility. (A. 089)

Sandy Frank Program Sales, Inc. (Frank), the Petitioner in the Case No. 75-4025, also filed extensive comments and reply comments in response to the Commission's Further Notice.

PTAR III--A Return To The Basic Rule, But With
Dangerous And Improper Exceptions

On January 16, 1975 the Commission adopted its Second Report and Order in Docket No. 19622. (A. 084) This Report, which was released on January 17, 1975, adopted still a different version of the Rule. This modification, PTAR III, is the subject of the various petitions for review now before the Court.

PTAR III, in the first instance, turns its back on most of PTAR II and returns to the basic provisions of PTAR I. Thus it generally bars network programs, off-network reruns, and certain feature films (though slightly different ones from those affected by PTAR I) from one of the four hours in prime time on each network owned or affiliated station in the Top 50 markets. To this extent, Frank applauds what the

Commission has done. However, the agency has engrafted certain exceptions on this basic rule. Some of these pose no particular problem, but one is improper and dangerous--the one which says that "Network or off-network programs designed for children, public affairs programs or documentary programs" need not be counted toward the three-hour limitation. This is Section 73.658(k)(1) of the Rules, and it refers to a Note at the end of the paragraph for definition of the terms used. NOTE 2 says nothing about public affairs programs, but provides:

As used in this paragraph, the term "programs designed for children" means programs primarily designed for children aged 2 through 12. The term "documentary programs" means programs which are non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself. (A. 116-117)

As will be pointed out in argument below, this improperly allows certain network and off-network programs favored by the Commission to invade the access time cleared for independently produced and syndicated programming, and does so without sound basis in the record and in contravention of basic policy which places responsibility for program decisions in local station licensees. Furthermore, the program categories in question are not properly defined and the implementation of this provision will involve the Commission in continuing decisions as to individual programs which are improper under

the First Amendment and Section 326 of the Communications Act (47 U.S.C. Section 326).

The Commission, in adopting PTAR III, again acted too precipitously by decreeing that the changes in the Rule should be effective on September 8, 1975, thus disrupting plans for the next television season. It also refused to announce that it would keep PTAR III in effect for five years, or some other extended period, to lend stability to the independent production and syndication industries which program access time, as the Department of Justice and others had suggested. (A. 115)

The Denial Of The Motion For Stay

On January 30, 1975, NAITPD filed a Motion for Stay, asking this Court to stay the effectiveness of at least a portion of PTAR III pending a decision on the merits of its contemporaneously filed Petition for Review in Case No. 75-4021. Frank and the others indicated above filed their respective petitions for review or motions to intervene. Frank also filed a written statement in support of NAITPD's Motion for Stay, and understands that Westinghouse, ABC and CBS also supported the motion, but that Warner Bros. et al. and NBC opposed it. The Court denied the request for stay and ordered an expedited schedule for briefing and argument-- although NAITPD and Frank had asked that, if the stay were denied, the appeal on the merits should be heard in normal

course since (1) a denial of stay means that PTAR III is in effect now, for all practical purposes, and will have produced irreversible and serious injury before a decision on the merits can be rendered, and (2) the cases could therefore be resolved in accordance with normal procedures, allowing the parties the time needed for a matter of this importance.

INTEREST OF THE PETITIONER

Frank is a distributor of syndicated television programming for access time. It has benefited greatly from PTAR I, which opened up significant prime time periods for programming, such as Frank distributes, which has never gone through the network selection-dissemination process. Its future viability as an entity engaged in trying to implement the Commission's policies as enunciated in PTAR I depends upon the preservation of as many of the time periods cleared by PTAR I as possible.

Frank was therefore deeply concerned when the Commission adopted PTAR II, because that revision of the Rule virtually amounted to the repeal or abandonment of PTAR I. Although Frank had not previously participated formally in Docket No. 19622, it filed a Petition for Reconsideration of the Commission's Order adopted on January 23, 1974--probably the most substantial such pleading submitted to the agency. (The Commission denied all petitions for reconsideration by Memorandum Opinion and Order released

May 2, 1974, 46 FCC2d 1013.)

Even before filing its Petition for Reconsideration, Frank had filed comments with this Court on March 5, 1974 in support of a then pending Petition for Stay which had been filed by NAITPD on February 28, 1974 with respect to the Commission's PTAR II order. Thereafter, Frank participated as amicus curiae in the oral argument heard by this Court on April 5, 1974 in National Association of Independent Television Producers and Distributors v. FCC, supra.

After the Court's decision in that case, Frank participated substantially in the further proceedings before the FCC. While it finds PTAR III much to be preferred over PTAR II, it is still aggrieved by the Commission's order of January 16, 1975. Frank filed its instant Petition for Review on February 6, 1975, and on that same day filed in Case No. 75-4021 (the lead case above) a "Motion For Leave to Appeal As Amicus Curiae and to File a Statement in Support of Petition for Stay" and an accompanying "Statement of Sandy Frank Program Sales, Inc. in Support of Petition for Stay", which was supported by its president's affidavit. Frank did not appear at the argument on the Motion for Stay on February 11, 1975 and its counsel did not learn of the Court's ruling of that date until February 14, 1975. Frank has done its best to prepare this brief in the very limited time available.

ARGUMENT

I. The Commission's Curtailment Of PTAR I By Engrafting On It The Exceptions Contained In PTAR III Was Arbitrary And Capricious Because PTAR I Had Substantially Achieved The Purposes For Which It Was Adopted And The Conditions Of Network Dominance Which Led To Its Adoption Have Not Been Remedied In Any Other Way, Because Such Action Departed From The Reliance On Local Licensee Responsibility Which Is Basic To The Scheme Of The Communications Act, And Because The Exceptions Were Not Shown To Be In The Public Interest.

As pointed out above, the Commission adopted PTAR I after more than ten years of careful investigation and study. Its findings as to network dominance and the virtual impossibility of independent producers' gaining the access to stations required for a healthy syndication industry fully supported the rules it adopted, as this Court held in Mt. Mansfield Television, Inc. v. FCC, 440 F.2d 470, at 483-487. If the Commission is now to change the original rule materially--as it seeks to do in PTAR III--it must make findings, supported by the record, which rationally justify the conclusions it reaches. It has not done so here.

Section 303 of the Communications Act (47 U.S.C. Section 303) requires that, to act within its statutory authority, the Commission must first find that its contemplated action serves the public interest, convenience and

necessity. This standard is ". . . the touchstone for the exercise of the Commission's authority."^{14/} As indicated above, in promulgating PTAR I the Commission found that the public interest required limitation on network control of the prime time program process and the creation of opportunity for the development of independent program sources. Licensee program selection responsibility had been almost completely usurped by networks in prime time. As a result, the public interest in a nationwide competitive television structure based on individual station program judgment had been seriously inhibited. PTAR I and the associated financial interest and syndication rules were designed to provide a "modest" means of serving the public interest in more responsive programming, a step which would, of course, partially correct this "unhealthy" condition. This regulatory scheme was not a scatter-shot cure-all for all the ills of television. It was a carefully structured and limited means of fulfilling a vital and urgent public interest need--to free stations, to some degree, from network dominance of prime time with its attendant invasion and usurpation of licensees' program responsibility.

In other words the fulcrum of the Commission's original action in establishing PTAR I was its carefully

^{14/} FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). See also, Beaumont Broadcasting Corp. v. FCC, 202 F.2d 306, 310-311 (D.C. Cir. 1952). (" . . . the Commission's overriding duty is to protect the public convenience, interest and necessity.")

considered finding of network dominance of the prime time program process to the exclusion of the stations and independent program sources, and the consequent damage to the public interest caused thereby. Commissioner Robinson argues, in his dissenting opinion, that network dominance is a fact of economic life which is inevitable under the Commission's allocation and licensing policies. (A. 182-187) To serve as a basis for Commission action, however, such a conclusion would, of course, require an adequate record, supporting clear findings of fact which could justify such a conclusion. No such record has been compiled and no such findings have been made--certainly not in this proceeding--and Frank is strongly of the view that no such findings could be sustained. Indeed a careful reading of both the Commission's orders--that of January 23, 1974 and that of January 16, 1975--discloses no indication that the degree and intensity of network dominance of prime time programming--except, of course, during access time--has been alleviated or eliminated in any way. On the contrary, in its January 23, 1974 order (PTAR II), the Commission rejected the claim of opponents of the Rule that it increases network dominance, pointing out (Par. 97) the continued "strong degree of dominance inherent in the networks' position, as long as they are three sellers on the one hand, as against hundreds of potential national advertiser customers, and three buyers on the other hand facing more than 100 producer-sellers." It noted, by way of

contrast, that the reduction in network control by operation of the Rule "is definite and readily apparent." And in its January 16, 1975 order (PTAR III), the Commission reiterated both these conclusions (Pars. 15 and 23 and Note 18, A. 092, 094, 097). In other words, although its PTAR III order materially weakens the remedy for the evil of concentration it found essential to the public interest in 1970, the Commission made no new evidentiary findings on which a less stringent remedy might rationally be adopted. The majority of the Commission seems to have been obsessed with the idea that PTAR I has been a failure and must be essentially weakened or scrapped. This attitude became apparent before the ink was dry on its order promulgating PTAR I. Indeed, the Notice of Inquiry which initiated the proceeding leading to PTAR II was adopted less than four weeks after PTAR I had become fully effective--long before it could possibly have had an opportunity to demonstrate its ability to serve the public interest by reducing network dominance and reestablishing station licensees as effective factors in the prime time program process. As we will point out below, the record shows that both of these objectives have been substantially accomplished despite the uncongenial--one might even say hostile--administrative climate in which it has been forced to operate.

We do not, of course, challenge the Commission's right to alter its rules and policies on the basis of a

rational process of decision, with adequately supported findings that changed conditions justify or require a different approach. But such alteration should not be adopted except on the basis of appropriate findings founded on an adequate factual record. In judging the actions of the Commission in this matter, one should bear in mind that had this Court not intervened with its deferral of the effective date of PTAR II and its cogent suggestions for further proceedings which the Commission might wish to conduct in order to collect and compile an evidentiary record upon which a rational judgment could be based, PTAR I would have been successfully aborted and, for all practical purposes, its ability to serve the public interest would have been vitiated before the Rule had had an opportunity fully to prove itself.

The revisions of the Rule made in PTAR III are fundamentally inconsistent with the underlying regulatory pattern for broadcasting provided in the Communications Act. In its 1970 Report and Order denying reconsideration of PTAR I, the Commission reaffirmed the essential nature of the public interest in licensee responsibility and autonomy:

. . . we are cognizant of the impact of the repeated statement in the letters and petitions by television affiliates of their almost complete dependence on networks for viable economic operation. This confirms our conclusion that our television broadcast structure is over-centralized and poses a serious question as to whether the basic concept of a competitive, locally responsible television structure as envisioned by Congress and this Commission is being implemented. One principal objective of our Prime Time Access Rule is to lessen the degree of network domination of station operation. The stations in effect are pleading

this domination as an element essential to their economic viability. If, as many licensees say in their letters and petitions, affiliates at present are so dependent on national networks that their economic viability and their ability to serve the public interest turn on whether they continue to receive revenues from an additional half-hour of network programming, they clearly are not in a position to exercise the appropriate freedom of choice and the responsibility for television service which are essential to the proper discharge of their broadcast trusteeships. The present degree of network dominance of television broadcasting, now so graphically confirmed by the letters and petitions filed on reconsideration herein, emphasizes the need for Commission action to improve the situation, and to seek to reestablish licensee individuality and responsibility as operable factors in television broadcasting. (Emphasis supplied; Footnote omitted)^{15/}

The facts underlying this conclusion were "simple" and "compelling".^{16/} Three national television networks had established an oligopolistic position in prime time television, controlling access to the crucial prime time hours, when most viewers watch television, almost completely to the exclusion of the station licensees who, under the statute and Commission policies, bear the sole, ultimate responsibility for programming. The Commission found this an ". . . inherently unhealthy situation in several respects"--principally because the networks and not the local stations selected and controlled virtually all the prime time programming for the nation. The Commission concluded:

The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime

^{15/} Network Television Broadcasting, 25 FCC2d 318, 329-30 (1970).

^{16/} Network Television Broadcasting, 23 FCC2d 382, at 385.

time programming. Existing practices and structure combined have centralized control and virtually eliminated needed sources of mass appeal programs competitive with network offerings in prime time.^{17/}

These conclusions are uncontroverted and are still as valid and central to the basic thrust and purpose of broadcast regulation as they were when they were announced in 1970. There is nothing in this record--or elsewhere, for that matter--to indicate that they have been downgraded or rejected and are now any less crucial to the public interest in television broadcasting than they were when the Commission adopted PTAR I. Presumably these fundamental public interest concepts remain the basic foundation of Commission policy.

It might be well to recall the place assigned to the local station in American broadcasting, and the vital importance the Commission has, in the past attached to that concept. In 1960 the Commission conducted a detailed review and appraisal of the regulatory system--particularly as it related to the then comparatively new nationwide network television broadcast structure. The status of licensees as trustees for the public in the operation of their stations and in providing television program service was reaffirmed as the touchstone of the regulatory scheme. After a lengthy and careful review of the functioning of broadcast regulation, the Commission made a clear restatement of the vital and indispensable role of the local station in television

^{17/} Id. at 394.

broadcast service:^{18/}

The foundation of the American system of broadcasting was laid in the Radio Act of 1927 when Congress placed the basic responsibility for all matter broadcast to the public at the grassroots level in the hands of the station licensee. That obligation was carried forward into the Communications Act of 1934 and remains unaltered and undivided. The licensee, is, in effect, a "trustee" in the sense that his license to operate his station imposes upon him a non-delegable duty to serve the public interest in the community he had chosen to represent as a broadcaster.

Great confidence and trust are placed in the citizens who have qualified as broadcasters. The primary duty and privilege to select the material to be broadcast to his audience and the operation of his component of this powerful medium of communication is left in his hands. (47 FCC at 2311; Emphasis supplied)

* * *

The confines of the licensee's duty are set by the general standard "the public interest, convenience, or necessity." The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met his public responsibility. (47 FCC at 2312; Emphasis supplied)

* * *

Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. . . . This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community. The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith,

^{18/} Report and Statement of Policy Re: Commission en Banc Programming Inquiry, 44 FCC 2303; 20 P&F Radio Reg. 1901 (1960).

to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This again, is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others.

Although the individual station licensee continues to bear legal responsibility for all matter broadcast over his facilities, the structure of broadcasting, as developed in practical operation, is such--especially in television--that, in reality, the station licensee has little part in the creation, production, selection, and control of network program offerings. Licensees place "practical reliance" on networks for the selection and supervision of network programs which, of course, are the principal broadcast fare of the vast majority of television stations throughout the country.

In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve in developing his programming and should exercise conscientious efforts not only to ascertain them but also to carry them out as well as he reasonably can. He should reasonably attempt to meet all such needs and interests on an equitable basis. Particular areas of interest and types of appropriate service may, of course, differ from community to community, and from time to time. However, the Commission does expect its broadcast licensee to take the necessary steps to inform themselves of the real needs and interests of the areas they serve and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests. (44 FCC at 2313-2314) (Footnotes omitted; Emphasis supplied).

The Commission's action in promulgation PTAR III, while somewhat less at variance with these established tenets of television broadcast regulation set forth in its 1960 Program Policy Statement than PTAR II, still undercuts the essential regulatory pattern of the Act. The Commission has totally failed to give a rational explanation for its abrupt and arbitrary change in basic policy. The purpose of PTAR I was to place a "modest" limitation on network programming power in order to break the "vice-like grip" of the

three national networks on prime time broadcast service. The limitation placed on the networks was, indeed, "modest". The networks retained the right to program three hours of prime time on the affiliated stations in the Top 50 markets affected by the rule.

Three hours had for many years been considered "network" time in the evening. This was the amount permitted to be "optioned" to networks by affiliates under the Commission's Option Time Rules.^{19/} Even under this three-hour prime time schedule, networks had "voluntarily" recognized their dominant position and had assumed the responsibility for providing program schedules including public affairs, documentary programs, children's programs, and the other components needed to provide a diversified national program service to supplement their affiliated station's local programming. By and large the networks did provide non-entertainment programming in reasonable proportion. This network contribution, however, did not then, and does not now, relieve stations of their obligation to furnish children's, documentary, and public affairs programming in appropriate amounts in "station time" as the ascertained needs of their communities may require.

Under PTAR III the Commission's original purpose will be defeated pro tanto as the networks--either directly,

^{19/} At that time included in Section 73.658 of the Commission's Rules.

or through off-network programs--invade prime time with children's, documentary, and public affairs programs. Also, and most importantly, the ability of stations to fulfill their programming responsibility in terms of the ascertained needs of their communities will, quite obviously, be seriously curtailed. This cuts deep into the avowed purpose of PTAR to reestablish the station as a viable and actual force in prime time programming.

The return to prior conditions of network dominance will not be as complete as would have been the case under PTAR II. However, it is obvious that the insertion of network and off-network programs in access time will have a marked tendency to dry up sources of independent programs and to further restrict community-oriented station programming.

There is no adequate discussion in the record of these vital questions or any rational explanation as to why the network and off-network non-fictional programs cannot be displayed in other than access time, or why the essential purpose of PTAR I must now be subordinated to the networks' commercial convenience by allowing them to place their public service type programming outside their three hour allotment of time each evening in the choice markets of the nation. In sum, the central purpose of PTAR I was to restore the regulatory pattern for broadcasting set forth in the Communications Act and repeatedly avowed by the Commission. The key to that regulatory pattern is the

responsibility of station-licensees to seek out and serve the ascertained needs of their local communities for broadcast service. That essential purpose seems to have been abandoned by the Commission without rational explanation. Both PTAR II and PTAR III are so fundamentally inconsistent with the Commission's stated objectives, and with the basic broadcast policy which PTAR seeks to vindicate, as to render the Commission's action arbitrary and capricious and not authorized by the Act. The Commission appears to have sought to effect substantial modification of its policies for broadcast regulation without proper notice or explanation. Its actions must be remanded.

Section 4(c) of the Administrative Procedure Act, 5 U.S.C. Section 553(c), requires an agency to formulate and express ". . . a concise general statement of . . . [the] basis and purpose" of a rule which it promulgates. Under this section, which is simply a restatement of generally accepted canons of essential administrative procedure, ". . . it is incumbent on an administrative agency to supply clear findings and reasons supporting the findings whenever it seeks to exercise its power. Meaningful review cannot otherwise be obtained. These axioms are deeply rooted in American administrative process and need no citation." (Emphasis supplied) International Paper Co. v. FPC, 476 F.2d 121, 128 (5th Cir. 1973). Absent such clear findings and reasons, a court will not uphold the questioned agency action. The

Commission has failed to meet this standard here.

As we have said, we do not deny the right of the agency to modify or repeal its regulations in a proper case. Such changes in regulations or policy may result either from the enacting agency's evolving concept of the public interest or from objective changes in the essential circumstances with which it is dealing. Greater Boston Television Corporation v. FCC, 444 F.2d 841, 852, cert. denied 403 U.S. 923 (1971). Neither of these considerations can explain the change of policy displayed in PTAR III. The deviation from past policy is, as we have said, somewhat less drastic than was the case with PTAR II. However, there are no findings by the Commission, in either its Order of January 1974 or that of January 1975, that the public interest considerations which required the enactment of PTAR I have so changed, or been so alleviated, as to permit abatement of concern about the problems it was designed to answer. Considering the forceful language with which the Commission described the "unhealthy" condition of television broadcasting in its Report and Orders in 1970, the lack of any substantial discussion of these fundamental issues in connection with the present modification of the rule is startling--and fatal to the validity of the action.

Nor can it be said that PTAR I has failed to achieve the essential purposes of the Commission in its enactment. There is no dispute that, despite a most unfavorable

administrative climate,^{20/} there has been a continuous supply of acceptable programming more than sufficient to implement station choice, and that such programming has been popular with the television audience. Much--indeed most--of the criticism of PTAR I has come from those who decry the network's loss of four hours of prime time because they enjoyed favored status as suppliers to the networks and whose inventory of off-network shows have been excluded from access time. They contend that the programs--particularly game shows which have been numerous and popular in access time--are not of a quality acceptable for prime time television. The short answer to this latter contention which appears throughout the comments of the major motion picture companies and their allies, is that the Commission, in adopting PTAR I, sought only to provide opportunity for the development of alternate program sources and to free licensees from sole dependence for prime time programs on the "network funnel". The Commission was explicit and forceful in stating that it favored no particular source of independent programming for access time, and that the types and cost levels of programs was not within the purview of the Commission, but would be the result of competition.^{21/} There is really no dispute that PTAR I has succeeded in the announced purposes assigned to it by the Commission--and the Commission so finds in its

^{20/} See pages 83-84 below.

^{21/} This Court quoted this language approvingly in its Mt. Mansfield decision, 442 F.2d 470, at 480, n. 32.

January 16, 1975 decision (PTAR III) in Pars. 15-19.

What, then, is the explanation for the Commission's persistence in its efforts to weaken the rule? One can conclude only that the Commission has continued, to the extent possible in light of the "new record" compiled at the suggestion of this Court, to seek to be all things to the major interests who have participated in this proceeding. To the extent feasible in the present posture of the matter, the Commission seems intent on following the course the Commission chose in PTAR II by acting ". . . to relieve the problems of the 'majors' and similar parties, by increasing the after market for former network material" (Par. 80) and to return substantial segments of access time to the networks (Pars. 77, 82).

Changes of substance in a major regulatory scheme should be based upon reasoned analysis and a statement of the rational basis for such action. The brief and sketchy explanations here offered are entirely inadequate and cannot be accepted in lieu of clear and cogent findings of fact resting on an adequate base. As illustrative of the bland "justification" offered by the Commission, consider the following paragraph from its PTAR III Order:

40. We have considered the argument that we should take other approaches to meet what we consider the shortcomings of broadcasting under the rule--require the networks to run children's programs earlier (giving up the 10:30 time slot instead of 7:30), requiring them to run a certain amount of public affairs in their own time, questioning stations about over-use of game shows or stripping, etc.,

rather than by relaxing the rule and nullifying its benefits. The same kind of argument applied to off-network material--licensees should be required to run it at other times or, if early evening access time is so important, to run it then and preempt network programs later. We do not agree. We believe that these alternatives would involve the Commission too deeply in day-to-day programming and scheduling decisions.^{22/}

Thus in cryptic and cursory fashion the Commission disposes of basic public interest consideration directly affecting the carrying out of its essential purpose in enacting PTAR I in the first instance. On the question of whether the network presentation of "desirable" programming should take precedence over the re-validation of station responsibility for programming and the limiting of network monopoly power which were central to the Commission's avowed purposes, the agency simply says it does not agree with the argument--which can hardly be dispositive of the matter--and then makes a statement which is sheer nonsense in view of its action in involving itself in the decision to schedule children's programming at 7:00 p.m.--and, in fact, at 7:00 p.m. on Sunday. Thus summarily to dispose of an issue of such gravity is to make a mockery of the Commission's duty to act responsibly in the interests of the public. See further discussion of this matter at pages 49 et seq. below.

In summary, the record shows that the Commission has arbitrarily and capriciously weakened PTAR I, while re-affirming that network dominance of the prime time programming

^{22/} 40 F.R. 4001, Par. 40, Jan. 27, 1975.

process--the problem which required the creation of the regulatory scheme--still exists, and that PTAR I has produced good results. There have been no developments in network television reflected in this record which, absent PTAR in its present form, could render the problem of network dominance less acute and less damaging to the public interest. The Commission has shown a continuing desire to weaken PTAR and to return a substantial portion of access time to the networks. At the same time the Commission has sought to improve the "after market" for off-network programs at the expense of access programming and the fulfillment of the original purposes of PTAR. While the drive to weaken the Rule is less apparent in PTAR III than it was in PTAR II, it is nonetheless readily discernible. While the Commission may, of course, change its policies on the basis of clear findings and reasons based on an adequate record, no such findings or record underlie the substantial changes in policy which the present modifications in the Rule reflect. Thus summarily to dispose of fundamental issues of policy cannot be accepted by the Court.

A. The Commission's Authorization of the Use of Certain Off-Network Programs in the Access Period Was Arbitrary and Capricious Because it Was Contrary to the Record.

In PTAR II the Commission returned Sunday night to the networks and withdrew all restrictions from the 7:00 to 7:30 p.m. time period on the other nights of the week. The

latter action would have opened nearly half of the access period--which the Commission had found vital to the development of non-network program sources in 1970--to the full array of off-network reruns. Such an action would have been almost totally destructive of the Rule, so it is fortunate that the PTAR III Order does not go so far, but only permits reruns of children's, public affairs, and documentary programs.

It is true that PTAR III is greatly to be preferred over PTAR II, because it basically returns to PTAR I. Thus it better serves the public interest in the availability of prime time fare not all of which is chosen and produced via the network funnel. This result was obviously dictated by the additional record compiled by the Commission in line with the suggestions made by this Court. As might have been anticipated, the public groups contacted by the Commission in line with the Court's suggestions were all but unanimous in their strong support of PTAR I as an appropriate servant of the public interest in locally originated programming to serve minorities, women, bilingual groups, and other significant segments of the television audience which previously had been all but ignored in prime time. The Department of Justice, whose opinion as to the competitive aspects of the matter was sought by the Commission, unequivocally recommended that the Commission reinstate "the original Prime Time Access Rule as initially formulated".

Further support for preservation of the rule in its original form was supplied by several station licensees who pointed out that program production and origination at the local station level was practical and had been accomplished by them, with very satisfactory results, absent competition from network or off-network programs. Breaking the network prime time monopoly to permit program service of these kinds was among the public interest purposes of the rule. The Commission, however, in promulgating PTAR III chose to restore PTAR I-- and then take part of it away again by creating built-in exemptions. Access time is still to be invaded by children's and public affairs programs and documentaries--both network and off-network. As we point out below, the Commission has ignored the fact that the broad "barn door" type of definitions it has used in PTAR III will permit the occupancy of an indeterminate, but perhaps substantial, amount of access time by reruns of programs in all these favored categories, instead of the new local or syndicated programs whose production PTAR I was designed to encourage. This action has been taken in the face of the Commission's original finding--quoted above, and which stands uncontroverted in this record--that to permit off-network programs to be "inserted in the place of network programming" would "destroy the essential purpose of the rule." Also, the networks, themselves, are to be permitted--indeed encouraged--to re-occupy as much access time as can be filled with these favored programs.

We repeat that we do not question the right of the Commission to change its regulatory policy in line with rational public interest findings based on an adequate record. However, in this case the Commission's action--even in the modified form contained in PTAR III--derogates from the avowed purpose of the Commission to re-establish the local station as the arbiter of program service in at least one hour of prime time each night.

Therefore, Frank submits that the Commission--while reaffirming (Pars. 14 to 16) the public interest in local station autonomy and the development of independent program sources implemented by PTAR I--has in effect weakened its tool for achieving those goals so substantially as to cast grave doubt on its ability to serve the public interest in having a locally-oriented, licensee-chosen television service for at least a portion of prime time.

There is not likely to be much use of off-network public affairs programs because they are generally quite topical in character and not likely to be appropriate for later rebroadcast. But many children's programs and documentaries are somewhat timeless in nature and can be used over and over again. Since these are desirable types of programs, it might seem that there should be no objection to permitting their re-use in access time. However, the one hour per night on each affiliated station was, at the outset, a very modest allotment of time for the purpose of giving

station licensees some real opportunity to program locally and opening up opportunities for a healthy syndication industry which could generate programs free of network control. Any invasion of these critically necessary time periods could be justified only by changed circumstances which either demonstrated that it is no longer necessary to clear the time in order to achieve the objectives of PTAR I, or that there is some overriding necessity to provide clearance for more important programs to achieve more urgent goals. Neither of these possibilities is established on the record here--nor do we think either of them could be established under current conditions.

It still remains vitally important to achieve the goals of PTAR I--and the Commission agrees. But it more or less off-handedly allows the re-entry of these two classes of re-run programming, without recognizing and evaluating the impact on its basic purposes. As in PTAR II, the Commission seems much concerned about the need for more programs of these types in prime time, but the steps it has taken are counter-productive. It should, instead, be requiring networks to generate new programs in these categories as part of their regular three hours of prime time each night (see below), and trying to create the most favorable conditions for the development of such programs by local stations and access producers and syndicators. Both of the latter groups have shown, on the record before the Commission, that they

have plans along these lines.

Re-runs of children's and documentary programs can be accommodated in other portions of station time if they are really deserving of re-use. These programs have already had one opportunity at national exposure and have recouped all or most of their costs. To allow them to enter access time in competition with new syndicated programs is both subversive of the objectives of PTAR I and a sort of unfair competition in terms of appeal (because of their familiarity and track records) and of cost.

Another problem, discussed below, is that there is likely to be much disagreement over what reruns qualify for these exemptions. Until that is resolved, the market will be in a chaotic state and syndicators of access programming will find it very hard to market their product.

There is simply no need to allow any reruns in access time and the Commission's action in authorizing such curtailment of these critical time periods was arbitrary and capricious.

B. The Commission's Authorization of the Use of Certain Network Programs in the Access Period Was Arbitrary and Capricious Because Any Need for Such Programming Could Be Met Within the Networks' Own Much More Substantial Portion of Prime Time, Without Impairing the Objectives of PTAR I.

The new exception for children's, public affairs, and documentary programs also applies to network offerings in these categories. That is, a network can expand the amount

of prime time programming it would otherwise be allowed to present--and will be allowed to invade the access time periods which PTAR I cleared for new syndicated programs or local originations--if it will present a program in one of the Commission's three preferred categories. As has been pointed out above, this seriously impairs the effectiveness of the Rule. Furthermore, it is not supported by any record evidence that conditions have changed since 1970 in such a way as to require this curtailment of the Rule, and the Commission was advised how it could achieve its objective without impairing PTAR I, but it rejected this suggestion without rational explanation. Its action was therefore arbitrary and capricious.

Frank does not dispute that these are highly desirable categories of programming, which should be offered more frequently on both the network and local levels. Indeed, as the Commission recognizes (PTAR III, Par. 15), one of the benefits realized from PTAR I is that it has provided good evening time in which stations can present local programs--often documentaries or public affairs--as well as the resources with which to do them.

Furthermore, Frank believes that the Commission has the authority, through its licensing process, to require its licensees to present a reasonable proportion of such programming in their schedules. See, for example, the Commission's Report and Policy adopted October 24, 1974 in Docket No. 19142,

Children's Television Programs, (FCC 74-1174, 39 F.R. 39396).

Although the Commission did not require specific quantities of children's programming, it said that "television must provide programs for children, and that a reasonable part of this programming should be educational in nature" and that "we do expect stations to make a meaningful effort in this area [i.e., children's programming]." (39 F.R. at 39397).

Frank also believes that the networks--in view of the large blocks of time they control on their affiliated stations and the major share of all television revenues which they command--have a duty to contribute national, high budgeted programming in all three of the categories here at issue, and that the Commission should hold them to this obligation. In other words, a local licensee should devote a reasonable part of his revenues to locally produced children's, public affairs, and documentary programs--or to suitable syndicated programs in these categories--to be presented in station time. But he can also look to his network to supply programs of these types which are national in outlook and appeal and which involve resources beyond the capability of most, if not all, local stations--and should expect those programs to be presented in time periods normally programmed by the network.

For very sound reasons the Commission divided the most valuable portion of the broadcast day--prime time, between 7 and 11 p.m. E.T. and P.T. and between 6 and 10 p.m. C.T. and M.T.--

between the networks and local licensees. It has just reaffirmed the importance of that action--to reduce network dominance, to provide opportunity for alternate program suppliers, and to get other benefits. But it then turns around, without logical explanation of adequate basis in the record, and says that the network may present some programs--of types which the Commission obviously regards as particularly important--in the station's portion of prime time.

The networks not only have 75% of prime time, but they have the best portion, when audiences are at peak levels and advertisers will pay the most for commercial time. Certainly they are able out of these resources to provide all aspects of their total public service within the time periods which they now program for their affiliates. Their operations in the years since PTAR I went into effect have been very profitable--indeed, the Rule is credited with having significantly helped ABC to become fully competitive with the other two networks.

Thus it cannot be claimed--and certainly the record does not show--that the networks need to be permitted to invade access time in order to afford to provide any children's, public affairs, or documentary programs the public interest may require of them. On the other hand, many of the companies which have tried to implement the Commission's policies as announced in PTAR I are still struggling to establish themselves. As noted above, the environment for the access

production/syndication industries has been very unfavorable, with the rule under attack and subject to reconsideration by the Commission almost from the first. This has compounded the problem for the numerous entities trying to build a viable independent program industry. On the record, there can be no doubt that the very limited number of time periods cleared of network and off-network programs by PTAR I are much more crucially important to the access program suppliers than to the networks.

And certainly the Commission has not explained why it is necessary to bribe the networks to serve the public's interest in children's, public affairs, and documentary programming. As noted above, the Commission has recently reiterated its authority to require broadcasters to provide a significant service to children. Its power to require reasonable attention to news and public affairs was confirmed by the Supreme Court's decision in Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969). Certainly some part of the programming necessary to discharge these obligations should come from the networks, both because they are better equipped than their individual affiliates to deal with national public issues and because they have the greater resources needed for much of this programming. Certainly it has never been thought that the networks should use their air time and great resources just to provide entertainment programming alone. They do provide news and public affairs

programming now--and do it in portions of the day cleared for them by their affiliates, including the 8:00 to 11:00 p.m. prime time period. They are already permitted to "present special news programs dealing with fast-breaking news events, on-the-spot coverage of news events and political broadcasts by legally qualified candidates for public office" in access time under existing Section 73.658(k)(2)--and this provision is being broadened to include broadcasts on behalf of candidates. Furthermore, in its Order adopting PTAR I, the Commission indicated that it would waive the rule for network sports overruns and for network news presented at 7:00 p.m. when preceded by an hour of local news--and it has done so. These policies are now being made permanent exceptions to the rule by PTAR III--and no one is complaining about that.

But there has been no showing made--and Frank does not believe one can be made--that there is any need at all to permit usurpation of the limited access time periods for the presentation of network children's, public affairs, and documentary programs. These are not live shows nor is there any necessity that they be presented on any particular date. They can easily be scheduled in the ample time periods already controlled by the networks.

The Commission says that there is a special problem with children's programs because it believes that starting them at 8:00 p.m. makes it inconvenient because of the lateness of the hour. It notes (Par. 30 of its Order of

January 16, 1975) that it "has received numerous complaints from parents, educators and others interested in children's matters, and sometimes from the children themselves, to the effect that this starting time [8:00 p.m.] is simply too late in relation to children's bedtime (except, perhaps, on Saturday)." Frank does not dispute this, and agrees that children's programs presented by the networks should be offered at 7:00 to 7:30 p.m. But there is absolutely nothing in PTAR I which prevents them from doing that today.

The Rule does not establish 8:00 to 11:00 p.m. as network prime time--it simply provides--as does PTAR III--that stations ~~shall~~ devote more than three of the four prime time hours to network or off-network programs. The networks chose the 8:00 to 11:00 p.m. portion of prime time for their use--because it is the most valuable part of the nighttime period--and the Commission simply acquiesced in this. The result was that the access program producers and distributors were left with the less valuable 7:00 to 8:00 p.m. period as their share--except that the networks began their programming at 7:30 p.m., so that access time on Sundays is from 7:00 to 7:30 p.m. and from 10:30 to 11:00 p.m.

Since the Commission has concluded that the networks should present children's programming earlier than 8:00 p.m., it should logically have required them to begin their prime time block at 7:30 or 7:00 p.m. on those nights when they do so. That would have accommodated the Commission's concern

about having network children's programming presented at an earlier and more convenient hour and would have left the networks with their 75% of prime time--but it would also have preserved the remaining 25% of prime time for the achievement of the vitally important objectives of PTAR I, and continued to provide an hour per night per station as opportunity for local programming and for new syndicated fare.

The Commission has, however, used a proper need to achieve an improper, illogical, and unnecessary end. It says that to "foster such material" it has decided to grant an exemption for such programming to permit its presentation in access time "in addition to the usual three hours of network material." That concession is neither necessary, since the networks can be required to live up to their public interest obligations, nor desirable--since the Commission's objective can be achieved without thus doing violence to the important objectives of PTAR I. Again, we see no reason to bribe the networks to do what the Commission apparently thinks the public interest requires.

Frank pointed this out to the Commission below. The Commission's response is contained in Par. 40 of its January 16, 1975 Order, which we have quoted above (P. 35) for another purpose. With respect to the suggestions that the networks be required to provide public affairs programming in their own time and to run children's programs earlier, the Commission's only reply was:

We do not agree. We believe that these alternatives would involve the Commission too deeply in day-to-day programming and scheduling decisions.^{32/}

^{32/} We are also not adopting rules, suggested by some parties in this connection and others, which would provide for some of the cleared time to be later in the evenings. We have decided to abandon the tie of cleared time to specific periods adopted in PTAR II, to return to the basic three-hour limitation, in the belief that any tighter limitation unduly reduces licensee freedom and flexibility, and gets the Commission too deeply into the details of station operation. As to the networks being required to give up the 10:30 time slot in order to run children's specials at 7:30, it is far from clear that an irregular schedule of this sort would serve the interest of access-period program producers, stations or the public. The Commission is concerned that such a trade off might have the effect of discouraging the early scheduling of children's programming.^{23/}

The first sentence from Paragraph 40 quoted above is merely the Commission's conclusion and does not discharge its obligation to state the reasons for its action and provide record support for any significant changes in policy. The second sentence--and the matter in Note 32 which is relevant to this issue--is patently absurd. The Commission adopted

^{23/} We address some of the matter in this footnote below, but a couple of points should be mentioned here: The statement that it is "far from clear" that giving the access programmers the 10:30 p.m. time slot if children's specials were run at 7:30 p.m. would benefit such programmers, stations, or the public is meaningless. It says next to nothing and its implications are completely erroneous. The access programmers have been programming 10:30 p.m. on Sunday and doing very well with the larger audiences available to them. The public seemingly enjoys the programs. And the stations reap the higher returns their access programs earn in this time slot. There would be no "irregular schedule" since it would be a regular weekly arrangement. And the concern that this might discourage early scheduling of children's programming is a slur on the networks, since it intimates that they would not yield the later, higher audience period in order to serve their obligations to children.

PTAR I in 1970; this Court affirmed it as a proper exercise of the Commission's authority (indeed, as a "discharge of its statutory duty", 442 F.2d at 480), and the Commission has now reaffirmed the need for this course of action. Having done this, it is ridiculous to say that the course in question would involve the Commission too deeply in day-to-day scheduling decisions. All that is needed is for the Commission to say that stations, in deciding which three hours of prime time they are to clear for their networks, shall clear either the period 7:00 to 10:00 p.m. or the period 7:30 to 10:30 p.m. on those evenings when the network is offering programming designed for children. That would combine the Commission's two policy decisions--that stations should not clear for more than three hours a night in order to achieve the objectives of PTAR I, and that network programming designed for children should be presented before 8:00 p.m.--serving both of them equally and doing no injury to any public purpose or private interest.

To have said that would have involved no more deep involvement in day-to-day scheduling than the basic provisions of PTAR I, since it would merely have combined that Rule with the Commission's new concern about the presentation--and timing--of children's programs. It would have left it to the stations and their networks to decide on which night or nights to present such programs. That decision would have been made with knowledge of the Commission's concern that children's programming be presented prior to 8:00 p.m.,

and the networks' schedules would have been arranged accordingly. That would not have involved the Commission any more deeply in day-to-day scheduling than its oft-repeated statements that radio and television programming unsuitable for children should be presented in later hours. See Appendix A--a series of articles from Broadcasting magazine and the Commission's Public Notice of February 19, 1975, with respect to its report on violence and obscenity on television--for an account of the Commission's recent efforts to insure that television programming presented between 8:00 and 9:00 p.m. should be suitable for viewing by the whole family.

Indeed, consider what the practical effects of the Commission's efforts to mandate a family viewing period from 8:00 to 9:00 p.m. will be when taken together with the exemption it is here granting for children's programs.

The Commission went out of its way to state (Note 25, Par. 31, Order of January 16, 1975) that "In the networks' regular prime time schedules starting in January 1975, it appears that only NBC's Disney program would come within this exemption." ^{24/} We refer the Court to the affidavit of Benjamin D. Raub, Vice President and Assistant General Attorney of NBC, submitted in Case No. 75-4021 in connection

^{24/} While this is a very fine program, we do not think it really qualifies for the exemption, for reasons set forth below. We also believe using it as an example here will give rise to much difficulty in drawing the line between programs which qualify and those which do not.

with the question of a stay. Mr. Raub points out that NBC already presents this program at 7:30 p.m. but says that it will now offer it at 7:00 p.m.--although Note 32, quoted above, indicated that the Commission thought the networks would only advance their prime time blocks to 7:30. The telegram from NBC to its affiliates, attached as Exhibit A to the affidavit, says (Page 1, Par. 2) that the network plans to follow Disney with an all-family program from 8:00 to 9:00 p.m.--mandated, of course, by the Commission's recent efforts referred to above. It goes on to say: "The balance of the network's 7:00 - 11:00 p.m. NYT Sunday schedule for 1975-76 will be announced later . . ."

Thus NBC--in the light of the Commission's concerns about children's and all-family programming--is advancing its network block by 30 minutes, but thereby picks up a whole hour of access program time because Disney will not now count toward the three-hour limitation. So the access producers and distributors will lose one hour each week--or 14% of their access time--on all NBC affiliates in the Top 50 markets which clear for the Disney program, which has very high acceptance.

What will ABC and CBS do? They have three choices: (1) They can do nothing (i.e. continue to program from 8:00 to 11:00 p.m. only), thereby virtually giving NBC the audience for an hour, so that it would enjoy an enormous lead-in advantage to its 8:00 p.m. program; or (2) they can program

all-family programs from 7:00 to 9:00 p.m. (the Commission frowns on anything more adult prior to 9:00 p.m.), but since this programming is not exempt they would have to terminate their network programming at 10:00 p.m., leaving NBC to run away with the ratings between 10:00 and 11:00 p.m.; or (3) they can do what the Commission obviously expects them to do and put on their own children's programs from 7:00 to 8:00 p.m., all-family programs from 8:00 to 9:00 p.m., and general program fare from 9:00 to 11:00 p.m. Network television is a highly competitive business and it is clear that ABC and CBS will choose the last alternative--indeed they have no real choice.^{25/}

In view of these facts of life, it is ridiculous for the Commission piously to reject a perfectly sound and logical method of handling the presentation of children's programming by saying it would "too deeply" involve it in scheduling decisions. How could it possibly be any more involved in such decisions! In fact, it has gone even further. It has really

^{25/} This means, of course, that the access producers and distributors will lose 1 hour per week, or 14% of their total access time, just by virtue of the networks' putting on just this one program under the exemption. It is misleading to talk of 1800 half hours per week of access time. Each affiliate has seven access hours, or fourteen half hours per week. There are three network affiliated stations in each of the Top 50 markets, for a total of 42 half hours per market per week--of which 6 would be occupied by the three one hour children's programs, leaving 36. If the networks present any public affairs or documentary programs under the exemption, or stations carry off-network programs in any of the three categories, then the limited openings for syndicated programming would dwindle still further. The dozens of access programmers would be competing for these reduced openings, with the result that some established programs will lose out and the chances of finding program periods for new, more innovative programs will be very dim indeed.

told the networks that if they want to pick up an hour of access time for children's programming without losing any of the prime time they now program so profitably, they will have to do it on Sunday. Not only is that the night on which NBC's Disney--the only Commission certified children's program--is now firmly ensconced, but the Commission has left them no other alternative. In Par. 34 of its PTAR III Order the Commission says that it expects networks and licensees to keep their use of exempt programming "to the minimum consistent with their programming judgments as to what will best serve the interests of the public generally."^{26/} It goes on to say that it continues "to attach high importance to the rule as a limit on network dominance over station time, and as a means of opening up substantial amounts of prime time to sources of new non-network programming, be they producers and distributors for syndication, or local sources." It then goes on to say:

We attach particular importance to the programming opportunities available on Saturday in the access time period. We do so because of the significance of existing local programming efforts in this time period, and the fact that this time offers the most significant opportunity for hour-long access programs. We caution networks to avoid any incursion into this period unless there are compelling public interest reasons for so doing. (Emphasis added)

^{26/} It would appear that the Commission expects them now to find that the public interest requires the presentation of children's, public affairs, and documentary programming to a higher degree than in the past. There is no basis for such a conclusion in the record. It is the Commission which has decided that there is a need for more in these categories.

We commend the Commission for its concern about the access time on Saturday night, but must point out that it should be equally concerned about all the limited time periods made available under PTAR I--and that the only rational way of accommodating all its policy concerns has been blandly rejected without any sensible explanation.

NBC got the message. Mr. Raub says that NBC will not schedule programs in the access hour on Saturday--and the telegram attached to his affidavit explains that this meets the views the networks' affiliates had expressed a year ago. We assume ABC and CBS will reach the same conclusion--although the latter planned last year to offer programming in the Saturday access time under PTAR II.

How about Monday through Friday for children's programming? Under Section 73.658(k)(3) the Commission has institutionalized its waiver for the presentation of a half-hour of network news at 7:00 when it follows a full hour of local news or public affairs programming. A good many stations have availed themselves of this option--and they are generally in the larger markets which are so important to the networks in getting clearance for their programs. So unless NBC wanted to disrupt this commendable expansion of local news programming, it could not schedule Disney on a weekday night any earlier than 7:30 p.m.--which would only gain it a half hour of access time instead of the hour it picks up on Sunday night, and would involve losing the established pattern

of viewing for the program on Sunday night. So the net of all of this is that the Commission has really decided that the networks should each present an hour of children's programming on Sunday night--which makes its expression of concern about becoming involved with program scheduling ring hollowly, to say the least.

But it should be remembered that the Commission undertook, in PTAR II, to return 7:00 to 8:00 p.m. on Sunday to the networks on Sunday, with absolutely no explanation other than the statement: ". . . we have concluded that some increase in network programming should be permitted, and Sunday appears a desirable time for this, including the 7 as well as 7:30 half hours, traditionally a popular family entertainment network period." (Emphasis added). But this hardly seems a logical explanation for returning a prime time hour to the networks while continuing to express support for objectives of PTAR I--which was designed to curb network control of prime time programming. So this time the Commission has made no outright gift to the networks of Sunday 7:00 to 8:00 p.m.--but it has achieved the same broad result, except that the networks will not receive this bonus time unless they program it as the Commission believes they should. This is still a departure from the Commission's policy of restricting network dominance of prime time--which it again reaffirms in Par. 34 of its PTAR III order quoted above. But the Commission reasons, perhaps, that no one can possibly

oppose children's programming, which is so obviously in the public interest! Frank does not oppose such programming. It does not object to its being presented in the 7:00 to 8:00 p.m. access period. But it does object to the Commission's failure, without adequate explanation, to maintain PTAR I's objectives by counting this programming against the networks' generous allotment of prime time and giving the access programmers compensatory time between 10:00 and 11:00 p.m. This action was clearly arbitrary and capricious and should not be allowed to stand.

C. The Commission's Authorization of the Carriage in Access Time of Certain Favored Categories of Network and Off-Network Programs Was Unlawful Because the Categories Were Not Defined Precisely Enough, So That the Commission Will be Involved in Continuing Decisions as to Individual Programs in Violation of the First Amendment and Section 326 of the Communications Act.

In addition to the objections stated above, Frank submits that the broadly drawn definitions of children's and documentary programs are so vague that they will inevitably cause confusion and involve the Commission in unlawful decisions in the sensitive area of prior clearance of individual programs.

The definitions contained in Note 2 to Section 73.658 (k) are too imprecise to enable those who will be bound or affected by the rule to make reasoned judgments about its meaning and scope. This will inevitably lead to disputes--

and to the danger that those who own rights to off-network programs will claim that they fall within one of the three favored classes in order to gain entry into access time. If a station is offered a program that appears on the borderline, it may accept it, with the possibility of greater curtailment of access time periods than the Commission intended, or it may ask the Commission for a declaratory ruling as to whether the program qualifies or not. This would involve the agency in prior clearance or approval of programs, which is the essence of the censorship in which the Commission is barred from engaging by Section 326 of the Communications Act (47 U.S.C. Section 326) and the First Amendment. Quite aside from the administrative burdens this would impose on the Commission, this would be a most dangerous role for it to play, and one totally out of line with the American system of broadcasting. It is a far cry from setting standards for renewal purposes, verifying licensees' classification of programs as recorded in their logs, evaluating complaints under Section 315 of the Act (47 U.S.C. Section 315) or the Fairness Doctrine, or any of the other limited activities in the programming field with which the Commission has been involved. It is a function beyond its lawful authority.

Note 2 defines a documentary program as one which is non-fictional and educational or informational. "Educational" may be somewhat limiting because it has overtones of some kind of systematic instruction or training in some

more or less academic pursuit. But "informational" is much broader and refers to the acquisition of knowledge concerning some fact or circumstance. The American College Dictionary defines "information" as including "news" and differentiates between "information", which applies to facts, which may be unorganized and even unrelated, and "knowledge", which is an organized body of information.

It appears from the Commission's PTAR II and III Orders that the documentaries it is most interested in fostering include such series as Appointment with Destiny, National Geographic, and America (PTAR II, Pars. 66 and 84) and National Geographic, Jacques Cousteau, and America (PTAR III, Par. 33). But the latter paragraph makes it clear that the exemption also includes Wild Kingdom and Animal World--and presumably any other half-hour program made from stock footage of animals.^{27/} If so, what else does it include? Does it

^{27/} This is surprising. New episodes of the two programs named are being distributed in access time, so there is no need to open up the restricted access time periods to re-runs of the programs which have run on the networks. The only beneficiaries of this action are the companies which own the rights to the old network programs. They are worthwhile enough, but they should not be allowed in access time because of the adverse impact they will have in diminishing opportunity for new programs. It will not do for the Commission to say, in Par. 33, that the benefit to the public from facilitating the presentation of these particular programs--which the Commission obviously likes, though that should be of no importance--"outweighs in importance what might be termed an increase in network dominance (to the extent these are network programs) and an incursion into the full availability of 3 hours a night of cleared time for other new material." [The last must be a slip of the tongue--the Commission must simply mean incursion into access time.] Such bare conclusions--particularly when obviously based on the Commissioners' "personal predilections and prejudices" (which they say, in Par. 20, is dangerous)--cannot constitute the reasoned statement required of an agency when it is changing or impairing major policies--especially when it purports to be reaffirming and following those policies.

include the network versions of This Is Your Life, which certainly contains information about the featured guest but would not, we think, normally be called a documentary? Would it include a series of feature prize fights or horse races or tennis matches broadcast in the past? They are non-fictional and contain information of interest to sports lovers. How about variety programs like The Andy Williams or Perry Como Shows? They are largely non-fictional and contain information--though none of it very vital. Or are they excluded under the rather confusing exception for "programs relating to the visual entertainment arts"? What of the Johnny Carson and Dick Cavett Shows? They are non-fictional and sometimes include a good deal of information--but hardly what we would regard as documentaries.^{28/}

The problem is, perhaps, even more acute in the field of children's programming. All that Note 2 says is that this means "programs primarily designed for children

^{28/} The only class of non-fictional and informational programming the Commission has clearly excluded in Note 2 is game shows, which often include elements of information (e.g. Jeopardy, Hollywood Squares, and the old Information Please and \$64 Question). If other non-fictional but entertaining programs with a modicum of informational content qualify for the exemption, on what basis are game shows excluded? The Commission has imposed a distinction without a difference--simply because it approves of animal programs and disapproves of game shows. There is no basis in the record for according totally different treatment to programs which are similar with respect to what appear to be the only criteria the Commission has. We are not, of course, urging that game shows should be exempted from the access rule, but only that the Commission has acted without support in the record, and has trespassed upon the prohibitions against censorship and impairment of free speech.

aged 2 through 12". That suggests a good and valid standard, involving programs designed by those familiar with the needs, capacities, and limitations of pre-school and elementary school children and intended to serve them specifically. In its recent Children's Television Report and Policy Statement in Docket No. 19142 (FCC 74-1174) released October 31, 1974, 39 F.R. 39396, the Commission talks of children's "immaturity and their special needs"; it says it expects television broadcasters "to develop and present programs which will serve the unique needs of the child audience"; it adds that "the broadcaster's public service obligation includes a responsibility to provide diversified programming designed to meet the varied needs and interests of the child audience"; it states that the licensee is obligated to make "use of television to further the educational and cultural development of America's children" and points out the importance of this in preparing them to participate in the democratic process; and while declining to specify minimum amounts of programming, it says it expects a "meaningful effort in this area" and, in particular, a reasonable amount of children's programming should be "designed to educate and inform--and not simply to entertain" and that the medium can and should be used "to further a child's understanding of a wide range of areas: History, science, literature, the environment, drama, music, fine arts, human relations, other cultures and languages and basic skills such as reading and mathematics which are crucial

to a child's development." (Pars. 16, 17, 18 and 22--emphasis added). This represents the Commission's conclusions after lengthy study of the issues with respect to children's television.

But the Commission does not include any such explanatory language in the Rule. It does express concern about abuse of this exemption in Par. 31 of the Order, saying that it should not be used for "network or off-network programs which, while having some appeal to children, were or are not primarily designed for them but for viewing by adults, or adults and children, and for presentation of normal commercial advertising addressed to adults." (Emphasis added) It goes on to say:

The programming permitted by the exemption is intended to be only that primarily designed for pre-school and elementary school children, ages 2 to 12, taking into account their immaturity and special needs.^{25/} Also, while the exemption is not limited to educational or informational material, an important purpose of it is to promote the presentation of such material, whose importance we have recently emphasized in our Children's Television Report and Policy Statement. (Docket 19142, FCC 74-1174, released October 31, 1974, 39 F.R. 39396, pars. 16, 17, 18 and 22).

^{25/} In the networks' regular prime time schedules starting in January 1975, it appears that only NBC's Disney program would come within this exemption.

There are two problems with this. In the first place, as noted above, the clarifying language--indicating that exempt programming must not be designed for viewing by adults and children, should take into account the immaturity and special needs of pre-school and elementary school children,

and should include educational or informational material--is not included in the Rule, which is the directive that station personnel, producers, and syndicators will normally work with. This means that in day-to-day operation, they will not have important information as to the Commission's full purposes before them. This will lead to confusion--and will permit those who own the rights to off-network programs which include children, or have in the past attracted audiences which included substantial numbers of children, to claim that stations can comply with the rule by carrying such programs.

In the second place, the Commission's singling out of the Disney program undercuts almost everything the Commission says in Par. 31. As a casual viewing of the program will make clear, it is a fine family program--that is, it is primarily designed for viewing by adults and children. It carries "normal commercial advertising addressed to adults." It does not take into account the "immaturity and special needs" of pre-school and elementary school children." And it does not feature "educational or informational material." It is a well done entertainment program for the whole family and draws a large measure of support from advertisers of products which have nothing to do with children. There is no educational material included in it, and whatever information may be contained in a few of its non-fictional or realistic-fictional episodes is presented in a form more suited for adults than children.

As is pointed out above, it seems certain that ABC and CBS will "fight fire with fire" by presenting programs comparable to Disney, and aimed, like it, at the whole family audience. Thus the networks major efforts to take advantage of the exemption will have only marginal, if any, qualification as children's programs as delineated in the Commission's cited Policy Statement. That seems to make a mockery of the Commission's conclusion that the importance of children's programming overrides the need to maintain the cleared time essential to achieving the objectives of PTAR I--which it says it still seeks to attain. On the other hand, if the networks--or the stations--insert additional children's programs into access time in pursuit of some of the higher purposes stressed by the Commission in its Policy Statement, that will still further undercut the viability of the access programming industry. As pointed out above, the need for more and better children's programming is real and important, but it should be satisfied within the networks' own prime time allotment and in other portions of station time. After all the child audience of 2 to 12 year olds is available--unlike their parents--in hours other than prime time.

And what of other family type programs? The Commission has not explained by what criteria it singled out Disney--it just knows that it likes the show. But how about Family Affair, The Brady Bunch, The Partidge Family, Lassie, Flipper,

Fury, My Friend Flicka, Gentle Ben, and many other former network series? These all involved children and all had a substantial appeal to children. They were generally non-violent and sometimes made worthwhile points about proper human conduct. Are they also to be regarded as qualifying for the exemption--and if not, why not? Certainly the proprietors of these programs are not going to regard it as self-evident that they fall outside the exemption, and are going to try to persuade stations to carry them in access time. Either they will be successful in this effort, and the chances of achieving the objectives of PTAR I will be greatly reduced, or the Commission will be called upon repeatedly to rule on their standing under the rule.

This is precisely what the Commission says it is trying to avoid by incorporating its past waiver policies into the rule. It recognizes that its granting and denying of waivers involved it in dangerous--and Frank believes unlawful--prior censorship or "licensing" of programs. But it has defined its terms so imprecisely that it cannot avoid infringing Section 326 and the First Amendment--and won't achieve its policy objectives either. On this further ground, the Court should hold the Commission's action unlawful.

II. The Commission's Modification Of PTAR I Was Arbitrary And Capricious Because It Was Essentially A Compromise Of Private Interests Which Ignored The Public Interest As

Reflected In The Record, And Particularly In The Comments
Of Public Groups Which Were Solicited At The Suggestion Of
The Court.

This Court, in its decision in NAITPD v. FCC, supra,
said:

The Commission may reach compromises, [citations
omitted], but it may not simply compromise between
the interests of different broadcasting groups and
gloss over the more fundamental public interest.
(502 F.2d at 257-258)

It made this statement in discussing the Commission's obliga-
tions to make the public interest paramount, placing it above
private interests in carrying out its duties. It concluded
that an important element in determining the public interest
is the views of consumer, minority, and other public groups,
and said:

The Commission should not only receive and carefully
consider these comments but, as we have said, should
affirmatively seek them out. One need not delve too
deeply into the agency's report to ascertain that it
has concentrated primarily on the comments of the two
groups of petitioners for it has admitted as much.^{17/}

^{17/} "Most of the discussion [in the Report] is based
on the 12 longer comments filed [by the major
producing and broadcasting interests]. Report
¶31, 44 FCC2d at ____." (502 F.2d at 258).

Although the Commission may effect a compromise of
conflicting interests as a solution to problems within its
jurisdiction, as the Court noted in its earlier decision,
such a compromise must serve the public interest. It is not,
in itself, a permissible substitute for the required "clear

findings and reasons" explicating the public interest which is needed whenever the agency "seeks to exercise its power." As Mr. Justice Frankfurter observed in his historic Pottsville opinion "the Communications Act is not designed primarily as a new code for adjustment of private rights through adjudication." FCC v. Pottsville Broadcasting Co., supra, at 138. The same basic tenet was stated in a somewhat different context by this Court when it said that the statutory authority of an administrative agency "does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965) cert. denied 384 U.S. 941 (1966).

The Commission has been more discreet this time. It did solicit the views of representative public groups as suggested by the Court, and received responses from some twenty-two such organizations (Order of January 16, 1975, Appendix B). As noted above, all but one of them strongly urged the Commission to return to PTAR I--with some of them requesting that the Rule be strengthened. The Commission duly notes all this (Pars. 9, 10, 15, 36, 37, and C-3 to C-14 of its Order of January 16, 1975--A. 89, 92, 104, and 122 to 127). It seems perhaps to have given some weight to the views of the public groups in its decision, nominally at

least, to return to PTAR I. But in carving out exemptions to the basic Rule, and thereby returning part of the very limited access time to the networks and opening other portions to the syndicators of off-network reruns, the Commission is again improperly engaged in effecting a compromise of private interests--at the expense of the public interest.

Although the Commission does not say outright that it has decided to give an hour of access time on Sunday back to the networks, as it did in PTAR II, that is precisely what is going to happen--as is noted above at length. We believe our earlier discussion demonstrates that there is no public interest basis for this result, either spread on the record or explained in the Commission's PTAR III Order.

Thus the Commission recognizes (Par. 36) that the arguments of the citizens groups and other proponents of the rule, while addressed either to repeal of the Rule or to the more substantial modifications in PTAR II, also applied pro tanto to the exemptions it has made in PTAR III. It then catalogues the arguments the parties--including the public groups--have made, and airily dismisses them by saying it does not anticipate "that these changes will have the untoward results claimed." Thus it says (Par. 37) it does not expect that opportunities for syndicated dramatic and comedy programs "will be seriously affected by the minimal reduction in time." It never bothers to calculate the probable impact of the changes it has made. We have demonstrated

above that the occupancy by each network of an hour on Sunday will reduce the access time period by 14%. If the networks do anything at all in the other two categories--public affairs and documentaries--that will involve still more time. And if the stations take advantage of the very loose definitions of children's and documentary programs, access time will be still further eroded. Frank and others have pointed out, in great detail, that the syndication industry already exists on a very limited base, with just 42 half hours per week per market. They have analyzed the effects of each incursion on this precious cleared time resource. And then the Commission dismisses NAITPD's argument as to increased competitive pressure as "too speculative!" The truth is that the Commission, by refusing to analyze the impact of its modifications of PTAR I, is the one that is speculating with the public's interest in diminishing network dominance and creating opportunities for alternative programming.

The Commission goes on to say (Par. 37) that it appreciates the participation of the public groups and says "we respect their views." But it then announces that it cannot accept one proposition it says they make--as if that disposes of all their arguments--and, in fact, mistates their position. It says it can't accept the view that network programming has little to offer, so the Commission should not permit its expansion if there is the slightest chance that

this would impede localism in prime time. It then intones, pontifically: "We have noted on many occasions over the years the value of national network programming, and the contributions it makes to American television."

This is all sham and pretense. It was the Commission which made the finding that an hour of prime time should be returned to local control. The public groups are not seeking any further invasion of network time--they are not seeking to reduce the "contribution it makes to American television." They are simply telling the Commission that the results of PTAR I--particularly in terms of local public affairs programming--have been good, and are trying to protect that enhancement of the public interest against impairment by the Commission, which is seriously eroding access time while giving lip service to the need to protect it. The networks can go on making their contribution in the 75% of prime time they still control, but localism should be allowed to grow in the remaining 25%. It is the Commission, not the public groups, which seeks change without adequate findings or support on the record.

The Commission has not been so brazen this time about its effort to appease the networks, the major film producers, or the proprietors of off-network programs. It says it is returning to PTAR I, but is actually seriously undercutting it. Frank can give personal testimony of the impact of this upon its business--and, it thinks, the public's

interest in a growing syndication industry. It had made plans for the production by others of two new programs for access time next fall--one a variety program featuring Bobby Vinton, the other a non-violent Western for family viewing starring Dale Robertson, perhaps the most important star ever interested in access programming, and to be produced by a man with an outstanding record with this kind of programming. Despite the fact that Frank has invested close to \$100,000 in this project over the last eighteen months, it is now facing a very serious problem with this program, which was budgeted at a much higher level than other access programs and would be of network quality. Due to the constriction on access time periods--and especially to the networks' occupation of Sunday night--the chances for the necessary station clearances have been so greatly reduced that it is almost certain that the program will have to be withdrawn. And the same thing will undoubtedly be true of most, if not all, of the 69 new programs which the February 19, 1975 issue of Variety says were unveiled for the first time at the convention of the National Association of Television Program Executives. There just will be no chance for new programs, different programs, to win a place in access time this fall--indeed, some of the established programs will be crowded out. If only the Commission really understood the industry it regulates it would not so lightly dismiss facts like this as "too speculative."

So, again, the Commission is balancing and compromising the interests of the private parties--as it frankly admitted doing in its January 23, 1974 PTAR II Order (Par. 82). It has taken somewhat less away from those who have tried to implement its PTAR I objectives, but in trying to do something for the networks and the owners of off-network programs it has undercut the continued viability of the access program industry. And it is in the development of that industry--and the expansion of local prime time programming--that it has said the public interest lies. But the public interest gets shunted aside in its effort to compromise the interests of the various private parties--and that makes its action arbitrary and capricious.

III. The Commission Acted Arbitrarily And Capriciously In Refusing To Lend Needed Stability To The Access Period Production And Syndication Industries by Announcing That The Rule, However Revised, Would Be Retained For A Period Of Five Years.

In Pars. 61 and 62 of the PTAR III Order, the Commission deals with the question of the future of the Rule--as it had, last time, in Pars. 118 and 119 of the PTAR II Order. It notes, in Par. 61, that "the Department of Justice, as well as many of the private proponents of the rule, assert that a period of assured stability for the rule is highly important for realization of its potential for the development

of new and varied programming. It recognizes that a five-year guarantee was urged by NTPD, Rank, Westinghouse Broadcasting Co., and others.

In response to this request--renewed again, as urged the last time around--it simply says it does not believe it appropriate to give the absolute assurance sought, in view of the uncertainties as to what will develop in the near future. It concludes:

While we recognize the need for stability, we do not feel it appropriate for this Commission to bind itself or its successors in this manner. (Emphasis added) 29/

It is certainly cold comfort for those who have relied on PTAR I--and tried to implement the Commission's policies announced there--to be told that the agency recognizes the "need for stability", but doesn't propose to do anything about it.

It is true that it is uncommon for administrative agencies to assure parties that its policies will be adhered to for any fixed period. But as a practical matter, most new rules adopted by the FCC--as PTAR I was in 1970--are expected

29/ Actually, the Commission does even less here than it did in PTAR II for those who have been kept in turmoil and subjected to continuing threats of repeal or revision of the Rule on whose continuance their futures rested. In Par. 119 of PTAR II the Commission recognized the desirability of certainty, said it was difficult for an agency to give assurances of the sort suggested, but said that in view of the long period devoted to the consideration of the docket and the "many other important, complex and pressing matters now before us", it was not anticipated that the Commission would take another look at PTAR again soon--and that, if it did, any such future proceeding would again take a long time. Thus the parties were indirectly given practical assurance of a substantial breathing spell. But this time the Commission will not even say that it sees no likelihood that the Commission, as presently constituted, will again consider PTAR in the near future!

to endure indefinitely. There is therefore no need to emphasize continuity of the newly announced policies. And all rules do bind the successors of the individual commissioners who enact them, because agencies can't change direction on basic policy matters every time there is a change in their composition. A decent regard for continuity in the affairs of an agency--and of the industries it regulates--requires an unstated, but nonetheless important, presumption that policy will not change unless and until conditions change substantially, so that a new evaluation of the public interest is necessary. And, as noted above, it is basic law that even then no change can be made without carefully made findings and clearly articulated conclusions--all on a record which supports them.

But the history of PTAR has been unique. Former Chairman Burch dissented when PTAR I was adopted, made no secret of his continuing opposition to the Rule, and was able to institute a proceeding looking toward its modification or repeal just twenty-five days after PTAR I became fully effective. In Par. 89 of its PTAR II Order the Commission discussed this:

. . . In reaching this conclusion [that the Rule had not had a fair test], we note the rule's relatively new status--in the first half of its third year, with the first in a sense "a different ball game" in that off-network material and all feature film could be used--and the historic preference of stations and others for the "tried and true" which takes time to overcome . . . Of equal, and perhaps greater importance, is the unfavorable climate which has

prevailed, due to the uncertainty as to the rule's future, for a number of reasons mentioned previously. 30/ (Emphasis added)

The Department of Justice, when its views were solicited in pursuance of the Court's suggestion, wrote to Chairman Wiley on September 20, 1974 with respect to this matter, it said:

Thereafter, however, the prime time access rule never had a chance to become a stable element in the broadcast regulation environment. Adopted May 4, 1970, the rule was to be fully effective October 1, 1971. Four months after its adoption, however, the Commission on August 7, 1970, significantly amended the rule, delaying until October 1, 1972, the effective date of the off-network and feature films provisions. [25 FCC2d 318 (1970) Appendix I]. On October 26, 1972, only twenty-five days subsequent to the revised rule's fully-effective date, the Commission initiated a further rule making proceeding concerning possible modifications, repeal, or extension of the rule. [37 FCC2d 900 (1972)]. In January, 1974, the Commission substantially amended the rule. [44 FCC2d 1081 (1974)].

The Court of Appeals refers to certain evidence suggesting that overall network power has been strengthened, not weakened, by the prime time access rule. (Slip Opinion, pp. 4268-4269). This might be an important competitive conclusion, if correct, and if the rule had been afforded a reasonable period within which to work. We would suggest, however, that empirical evidence is not yet reliable in this matter and that all the relevant factors have not been adequately examined. Competitive policy and the Commission's responsibilities under the public interest test must be directed to long-term effects. The simple fact is that empirical evidence now available does not seem entitled to great weight in the present circumstances, since the prime time access rule was never given an opportunity to work. Until it is, there is no possibility of determining by empirical evidence what the resulting competitive relationships are.

Such an unstable rule simply did not give independent producers any reasonable opportunity to develop and successfully market programs for the prime time access

30/ See, e.g., Pars. 32(2) and 82.

period. Generally more than one season is necessary to plan programming and offer it profitably. Excessive and rapid changes in marketing prospects are likely severely to retard the development of an independent program production industry even if they do not entirely prevent it. Therefore, if this type of rule is to be used, Commission assurances are needed which will permit independent program producers to proceed with confidence that marketing prospects in the future will be reasonably stable. Recently, the Commission endorsed proposals for the long-term funding of public broadcasting as desirable for necessary advance program planning. See Testimony of Commissioner Robert E. Lee Before the Subcommittee on Communications of the Senate Committee on Commerce on Long Term Federal Financing of Public Broadcasting, August 6, 1974. Analogous considerations appear to be applicable here.

While it is too early to determine whether the original prime time rule is in fact likely to produce its intended results, we believe considerations of fairness dictate that it be given a decent opportunity to work or not. The Department, accordingly, recommends that the Commission restore the original prime time access rule as initially formulated and that it accompany this action with an announcement that it intends to let the rule remain in effect for a suitable period, perhaps five years. Such a time period should be adequate to permit not only the development of any new independent production capabilities but also of any necessary supporting services, such as syndication, promotion, and financing. Upon completion of such a trial period, the Commission would have available an extensive basis of empirical information sufficient to measure the success of its objectives. (Emphasis added) (A. 80-81).

We think this, together with the Statement of the Case above, makes it clear that PTAR I has been beleaguered from the first. Under these circumstances, it needs to be strongly reasserted--and those who depend on it must be given assurance of some surcease from never-ending turmoil and concern about whether they can expect to be in business eighteen or twenty-four months hence. The Commission's refusal to give assurance that PTAR I will now be kept in effect for

five years^{31/}--not only reasonable under the circumstances, but necessary to achieve the Commission's own avowed objectives--was arbitrary and capricious.

IV. The Commission Acted Arbitrarily And Capriciously In Directing That PTAR III Should Go Into Effect on September 8, 1975.

This Court held, in National Association of Television Producers and Distributors v. FCC, supra, that the Commission could not put the changes made in its January 23, 1974 PTAR II Order (which was released on February 6, 1974) into effect on September 1, 1974 as it had tried to do. The Court ruled that any effective date for the PTAR II changes earlier than September 1975 "would be unreasonable because it would cause serious economic harm to independent producers and because it gives networks inadequate time to plan additional programming." It therefore remanded the case "to permit the Commission to specify precisely what the effective date should be." (502 F.2d at 259)

However, in discussing the issue of the lead time required before changes of this sort can be made effective, the Court noted that when the Commission adopted PTAR I in

^{31/} Any such assurance, of course, would be subject to sudden and substantial changes in circumstances which would undercut the validity of PTAR I's objectives. But the parties need to be assured that the Commission will not, on its own motion or on petition by CBS or the movie majors, institute a further proceeding to "review" PTAR just because there are still game shows in access time or someone doesn't like the current crop of syndicated offerings.

1970 it allowed the networks sixteen months to phase out their syndication activities, and allowed the same period before making the access rule itself effective. It pointed out that the parties, other than Warner Bros. and MCA which urged immediate repeal, had proposed a notice period much longer than the eight months allowed by the Commission. It reviewed the differing arguments and concluded that: "The longer grace period permitted the networks to cushion the adverse impact of the original rule should also have been granted the independents in this case." (502 F.2d at 254). This was a holding that a minimum notice period of sixteen months should have been allowed in making changes in PTAR I.

In remanding the case to the Commission the Court postponed consideration of the merits of the petitions then before it and suggested that the Commission might "choose to utilize the additional time available to it to reconsider the changes in the rule." (502 F.2d at 255). It therefore dismissed all petitions "without prejudice to their being brought anew after the Commission has had an opportunity to conduct such further proceedings as it deems appropriate." (502 F.2d at 258).

If the Commission had rejected the suggestion of further proceedings and had immediately notified the interested parties that it still intended to implement PTAR II, it would have had to allow sixteen months from June 18, 1974, the date of the Commission's decision, in order to comply with the

Court's holding as to the required notice period. The sixteen months could not have been counted from February 6, 1974, the release date of PTAR II, because until the Court acted the status of the Commission's regulation of access time was up in the air, as it has been virtually from its inception. Thus the earliest date the Commission could have specified for implementing PTAR II would have been some time after October 18, 1975, rather than the September 8, 1975 date the agency has tried to impose.

Of course the Commission did not follow that course. Instead, it issued a Further Notice Inviting Comments on July 17, 1974. Voluminous comments were received, and reply comments were filed on October 10, 1974. On November 15, 1974 the Commission issued a news release entitled "Commission Issues Staff Instructions in Prime Time Proceeding." This page-and-a-quarter document briefly outlined the provisions of the Rule as the Commission then proposed to amend it. This was the first official intimation of the possible direction the Commission might take, but was not, of course, a decision in any sense of the word. The notice indicated that the Commission planned to make its proposed modifications of the Rule effective on September 1, 1975. However, the minimum period of sixteen months specified by the Court on the prior appeal would run to March 15, 1976 and not September 1, 1975.

But of course the time could not start to run from

November 15, 1974, because that was not a formal order fully advising the parties of the Rule with which they would have to live, and the reasons underlying the changes. Such notices, in Commission practice, are preliminary and subject to change. In fact, Frank and others, on both sides of the controversy, made efforts to persuade the Commission to modify the course of action indicated in the November 15, 1974 notice. Frank was advised that the matter was still under consideration, with a number of matters still in dispute--including the question of the effective date for the rule changes.

The Commission did not release its formal PTAR III Order until January 17, 1975. That was, therefore, the date when the parties were first formally and fully advised of the future shape of the Commission's policy with respect to prime time access. The Court's sixteen months notice requirement would mean that the new changes could not be made effective before May 17, 1976--not September 8, 1975. In fact, of course, the parties can't really chart their future courses of action until this Court rules on the petitions for review, which would require still further postponement in making any rule changes effective if the Court affirms the Commission's action.

The Commission acknowledges that many proponents of the rule had argued that it could not make any changes in the Rule, reducing the amount of cleared time, and have them

effective in less than sixteen months from the date of its new decision. All that the agency says in response is contained in Paragraph 64 of its Order:

We respectfully disagree. The changes adopted herein constitute less of an incursion into available access time (particularly in light of our admonition of network and licensee restraint) than would have occurred under PTAR II. We believe that the public interest dictates that the new modifications become effective at an early date because we feel that the rule as amended in this Report and Order will best serve the public interest. Finally, parties to this proceeding have been on notice as to the specific changes adopted in the rule since November 15, 1974, the date of our Public Notice concerning staff instructions in this matter. Therefore, we conclude that these changes can go into effect in September, 1975.

This is no answer at all! It is irrelevant that the changes now made constitute less of an incursion into access time than would have occurred under PTAR II. That would have been true in 1970, also, because PTAR I was less extensive in its effect than the Network 50-50 rule which the Commission had originally proposed. If the agency's argument were valid, it could have put PTAR I in effect on the minimum statutory notice of thirty days--and could do the same thing in any case where it finally adopts a somewhat less stringent rule than it originally proposed. That would clearly be unfair. PTAR II never formally went into effect, though its effects were felt! Thus the independent producers and syndicators are not being allowed to expand their access time, as the Commission suggests. Under the Court's decision on the prior appeal, PTAR I remained in effect. Thus the impact of PTAR III is to restrict the time

periods the access programmers were entitled to assume they could fill until they were formally advised of the changes made in the January 16, 1975 PTAR III Order. Those changes restricted the rights they had enjoyed up until then.

The Commission then reverts to the justification it tried to use in PTAR II, namely, that it believes the new rule is a better rule and so it should be put into effect at an early date. But the Court noted the Commission's use of this argument in its decision last June (502 F.2d at 254):

The Commission based this decision on a finding that "the public interest is served by making improvements in any rule effective at a reasonably early date" and that a lengthy lead time was unnecessary "in view of the limited expansion of network programing which we have decided to permit." Id. 44 FCC2d at ____.

The explanation is no sounder now. Presumably every rule the Commission adopts is, in its judgment, a change for the better and therefore in the public interest. If its rationale here were accepted, the agency could adopt any rule as being "in the public interest" and then make it effective on unreasonably short notice which takes no account of the problems posed for parties affected by the change. That cannot be reconciled with the Court's decision on the prior appeal.

Nor does it do the Commission any good to refer to the notice of November 15, 1974 because the Court's sixteen month notice period would not expire until March 15, 1976. Furthermore, the bare recital of the Commission's tentative decision as to the course it wanted to pursue was not adequate notice to interested parties. The instructions had to be

converted into a reasoned decision--and problems are often encountered in that process which require rethinking of the end conclusions to be reached. In addition, as mentioned above, Frank and others tried to persuade the Commission that changes were necessary in the indicated result--and were advised that the matters were still open. So no one really had notice of the shape of things to come until the Commission issued its decision on January 17, 1975.

It should also be noted that the Commission does not recite any grounds which could be claimed to make such prompt implementation of the rule changes necessary. Indeed, no claim of such urgency was made on the record--the opponents simply arguing that the Rule was undesirable and should be terminated immediately. On the other hand, Frank and other independent producers and syndicators made it clear on the record that the time frame required to get ready for the Fall 1975 television season had already forced them into the expenditure of substantial time and money in planning new programs, making tentative arrangements for production, and launching marketing efforts. The lead time required in such efforts meant that Frank--and others--had to make commitments on these matters prior to issuance of the Commission's decision. The balance of equities, on the record, still favors the independent producers--as this Court ruled in its June 1974 decision.

There is simply no way in which the Commission can

make its PTAR III revisions effective on September 8, 1975 and still comply with the Court's ruling on this issue. The agency's effort to ram its revisions of the Rule down the throats of affected parties with respect to the Fall 1975 television season was therefore arbitrary and capricious and an abuse of power--indeed, it bordered on contumacy.

CONCLUSION

The record in this proceeding clearly establishes that PTAR I, as affirmed by this Court in the Mt. Mansfield case, is still a valid and necessary tool for dealing with the problems which the Commission found to exist in 1970. Indeed, the Commission reaffirms this.

However, the Commission has gone on greatly to weaken the chances of achieving the objective of PTAR I by engrafting exceptions on it which allow incursion into the limited access time by network and off-network programs in three Commission-favored categories. This is not supported by the record and any valid purpose the Commission may have could have been accomplished in other ways, without endangering PTAR I. Furthermore, the definitions of the exempted program categories are so imprecise as necessarily to involve the Commission in individual program judgments in violation of Section 326 of the Act and the First Amendment.

Furthermore, the Commission has again reached a result which compromises private interests, rather than serving

the public interest. It has again arbitrarily refused to lend stability to the struggling access industry by assuring parties that the Rule, however it may be revised, will be maintained for five years, as urged by the Department of Justice and others. And it has again sought to force its will upon parties seriously damaged by its action without allowing adequate notice and opportunity to adjust--as required by this Court's ruling on the prior appeal.

This result is wholly arbitrary and capricious and contrary to the record and the applicable law. It cannot be allowed to stand.

This will be the third time this matter has been before the Court. It is time, all would agree, that the matter be resolved and that the parties be allowed to go about their business under stable conditions. We respectfully urge the Court to give the Commission the clearest possible directives as to the course it must take to implement the public interest policies of PTAR I so that this matter may be put to rest. Office of Communications of the United Church of Christ v. FCC, 425 F.2d 543, at 550 (D.C. Cir. 1969).

Respectfully submitted,

SANDY FRANK PROGRAM SALES, INC.

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/s/ John Wells King
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February 21, 1975

Its Attorneys

run-down rooming house. Karen, out of 20th Century-Fox Television, stars Karen Valentine as a government employee in Washington whose two female roommates are an FBI agent and a lawyer-turned-bartender. The executive producers are Gene Reynolds and Larry Gelbart (*M*A*S*H*).

Toma was getting survival ratings in its Friday (10-11 p.m.) time-slot last winter but ABC canceled it when the star, Tony Musante, refused to return for another season of the weekly grind. But on Jan. 17, the network will bring *Toma* back in the same time period with movie actor Robert Blake (*In Cold Blood*) in the title role. "The show will have a lighter touch with Blake in it," said Mr. Duffy. As before, Roy Huggins will be executive producer for Universal.

Finally, ABC has unearthed a funny captain of detectives in New York for its lead-off show on Sunday (7:30-8 p.m.). Called *Barney Miller*, the sitcom stars Hal Linden and will be produced by Danny Arnold.

Over-all, "we're playing to our strength, which is contemporary, youth-oriented programing," said Mr. Duffy. He added that ABC is particularly deep in theatrical movies for the first part of 1975, and he rattled off titles like "Oliver!", the musical version of Dickens's "Oliver Twist"; "Walking Tall," the urban Western about a Tennessee sheriff, Buford Pusser; "Crazy Joe," about New York's Mafia wars of the 1970's (particularly the ones involving Joey Gallo's family); Elaine May's sardonic comedy, "The Heartbreak Kid"; Julie Andrews and Rock Hudson in "Darling Lili"; and Alfred Hitchcock's "Frenzy."

Meanwhile, NBC sources said the cancellation of Universal's *Ironside* (Thursday, 9-10 p.m.) in favor of Paramount's new private-eye series, *Archer* (starring Brian Keith as Lew Archer, the protagonist of a number of novels by Ross Macdonald), may be the only other change NBC will make this year. That would mean that *Lucas Tanner* and *Petrocelli*—shows thought almost certain to be scrubbed from the schedule by January—have been given reprieves.

CBS executives were still considering one or two other second-season changes last week (*Planet of the Apes* is the most likely casualty), but a network spokesman said no announcements would be forthcoming until later this month.

Yablans steps aside

Paramount president moves out as ex-ABC programmer Diller moves in

Frank Yablans, president of Paramount Pictures Corp. and its television subsidiary, Paramount Television, resigned, as expected, last week.

Mr. Yablans's resignation, effective Jan. 5, came seven weeks after the surprise move of Harry Diller, then ABC vice president of prime-time programing, to Paramount as chairman and chief executive officer (BROADCASTING, Oct. 7).

Mr. Yablans is given credit for helping

put Paramount back into the black with such feature movie blockbusters as "The Godfather," "Paper Moon," "Serpico," "Chinatown," "Longest Yard," and "Death Wish." He also was involved in the studio's financially not-so-great "The Great Gatsby." He is said to have been intimately involved in the studio's sale of "The Godfather" to NBC for a one-time showing. (The film is to be shown in two parts Nov. 16 and Nov. 18.) After executive positions with Buena Vista (Disney) and Warner Bros., Mr. Yablans joined Paramount in 1969 as assistant general sales manager, went up the ladder becoming president and chief executive in 1971. There was no announcement of his plans at week's end.

Mr. Diller, who joined ABC in 1966, was, during his association with the network, in charge of movies of the week as well as feature film broadcasts, before being named executive in charge of all prime-time programing last year. At one time he also was in charge of ABC's Circle Films, the network's feature film producing company, that since has been dissolved.

Will networks take the pledge against sex and violence?

Wiley to offer them salvation in return for self-regulation that will ease pressure from Hill

Before moving to Washington as general counsel of the FCC in 1970, Richard E. Wiley was something of a lay preacher in the Chicago suburb where he lived. Traces of evangelical fervor have been evident since his elevation to the FCC chairmanship and will probably be in view again next Friday when he meets with the presidents of ABC, CBS and NBC in an effort to persuade them to see to it that their networks act with "taste, discretion and decency" when presenting material that is "sensitive" or "controversial."

Chairman Wiley has asked Elton Rule of ABC, Arthur Taylor of CBS and Herbert Schlosser of NBC to meet with him in his office in the hope that he can win from them a commitment for voluntary action that will obviate the need for government action to deal with the broadcast of sex and violence, particularly as they affect children.

The demands for such commission action have been growing. The commission hears them from the public—as at a regional meeting in Chicago last month—and, more to the point, from Congress. The commission has been directed by the House and Senate Appropriations Committees to report by Dec. 31 on steps it has taken or has planned to "protect children from excessive programing of violence and obscenity."

The pressures from public and Congress constitute one horn of a dilemma for Chairman Wiley. The other is his dis-

taste, on legal and moral grounds, for governmental intrusion into programing.

In a similar situation involving children's television he fell back on jawboning. And it worked—at least to the extent of convincing the industry of the wisdom of adopting, for itself, the kind of commercial time standards for children's programing he thought appropriate.

The chairman's leverage is not as great on sex and violence. Where there was little question as to the commission's authority to adopt rules governing commercial time standards, there are serious questions as to the kind of rules the commission could adopt for programing.

In any event, there is no reason to believe that the chairman has changed his mind about the kind of regulator he saw himself in the speech he delivered at the National Association of Broadcasters convention, in Houston, on March 19, shortly after he became chairman. "I neither seek nor even countenance the role of the national arbiter of media truth or objectivity, or of the keeper of the nation's morals, or of the protector of its youth," he said. But he added that if broadcasters "won't serve as public trustees, if they attempt to evade and avoid their fiduciary responsibilities . . . then inevitably the call will be for government action and government redress," (BROADCASTING, March 25).

The chairman, in a speech to the Illinois Broadcasters Association, last month, suggested a number of actions the networks could take voluntarily to present "sensitive or controversial" programing with "taste, discretion and decency." He talked of "intelligent scheduling, appropriate warnings and, perhaps, even some kind of industry-administered rating program"—similar to that employed by the motion picture industry—which would afford protection to those members of the public "who may need it," particularly children (BROADCASTING, Oct. 14).

Chairman Wiley discussed these and, reportedly, other suggestions for voluntary action in his meeting two weeks ago with the three networks' Washington vice presidents—Eugene Cowan of ABC, Richard Jencks of CBS and Peter Kenney of NBC ("Closed Circuit," Nov. 11). The proposals were to be relayed to the networks' principals, so that they would be able to discuss them—along with any they might propose—in their meeting with the chairman this week.

The chairman is said to have been generally pleased by the reaction of the networks' Washington vice presidents to his proposals, although the degree of warmth the three generated was not, reportedly, uniform. But the chairman has more than the network chiefs' goodwill to count on in his effort to persuade them to take some meaningful action.

There is, first, the matter of public and congressional opinion. In the report requested by the Senate and House committees, the chairman can be expected to relate not only his effort to secure the networks' cooperation, but the result of that effort. If the response is negative, the networks' life in Washington will not be eased.

Furthermore, there is the possibility of

some regulatory action. The commission could issue a policy statement, as it did in the case of children's television programming, or a notice of inquiry and proposed rulemaking that would embody the kind of proposals the chairman discussed in his Illinois speech.

A commission task force assembled to prepare the report for Congress is drafting such a notice under the supervision of Paul Putney, the Broadcast Bureau's assistant chief for law. He says the draft may propose rules barring the scheduling of violent programs at a time children might be expected to watch them and requiring a more elaborate system of warnings than is now in effect. (Stations might be required to issue audio and video warnings that certain material is unsuitable for children, carry such warnings in newspaper listings, and possibly even insert a symbol in the picture to serve as a warning to persons tuning in while the program is in progress.)

Another idea under consideration is to require broadcasters to provide detailed information in their logs of every violent episode they carry. Such logging, presumably, would be so onerous as to discourage broadcasters from carrying such material.

Mr. Putney also said the draft would probably include some reference to a rating system. The commission would presumably ask for comment on how the industry could operate such a system; government operation would not be considered.

The commission has not yet discussed whether it should issue such a notice. Chairman Wiley last week indicated that decision would be very much influenced by the results of his meeting with the network chiefs this week.

Networks look fore and aft on programing

Ahead, they see more problems with prime-time rule, rising costs: Starger cites lessons learned from this season's cancellations; White justifies 'Godfather' price

The cost crunch, the upsurge in comedies and the return of variety shows to television were the principal topics of the three network programming chiefs last week at the Hollywood Radio and Television Society meeting, but it was a comment by CBS's Fred Silverman that jolted the audience.

Mr. Silverman, commenting on the prime-time access rule, said he did not know what the FCC was going to do about the rule, and added: "But the worst thing that could happen to us would be to get an hour back daily next year." Mr. Silverman later explained that it would take at least two years to prepare programming for the eight extra half-hours that would become available if the FCC rescinded its prime-time access rule completely. But, Mr. Silverman cau-

Thinking it over. Motions to dismiss the antitrust lawsuit filed in 1972 by the Department of Justice against the three networks were taken under advisement last week by U.S. District Judge Robert Kelleher in Los Angeles after lawyers for the networks and the Justice Department discussed the networks' petition for access to President Nixon's tapes. The networks allege that the Nixon administration originated the suit as a political move against the networks and that the tapes would prove this. The government has denied the charge; in fact the special Watergate prosecutor's office concluded there is no basis for the allegation that the antitrust suit was entered in retaliation for alleged anti-Nixon bias in news reporting (*Broadcasting*, Nov. 11). Some of Judge Kelleher's comments at the oral argument last week led lawyers to fear that Judge Kelleher might dismiss the lawsuit without prejudice, meaning that it could be refiled by the Department of Justice without suspicion of taint of political renovation. Judge Kelleher did not indicate when he might issue his decision. The government seeks to bar the networks from producing their own TV programs.

tioned, CBS is planning programming for at least one additional hour weekly for the 1975-76 season—an inference on how that network feels the commission will decide when it does.

The bulk of the comments and answers to questions by ABC's Martin Starger and NBC's Larry White, as well as Mr. Silverman, related to costs and forms. As to the former, the producers in the audience (about half the audience of a record 700 attending the luncheon) were told in no uncertain terms that they will have to learn ways of cutting costs, without degrading quality. This was much the same viewpoint that was expressed by NBC-TV President Robert T. Howard last month (*BROADCASTING*, Oct. 21). There was evidence, however, that the networks were considering increasing their payments to producers to some degree.

All three programming chiefs agreed that there will be more half-hour shows in the coming seasons. Mr. White noted that comedy was needed today to take people's mind off the current economic situation. The form generally is 30 minutes, he added. Mr. Silverman, agreeing with Mr. White's assessment, added that he saw more hour-long shows as well as variety shows, "perhaps eight to 10 hours weekly in the 1975-76 season." He also foresaw a rise in two-hour and perhaps two-and-a-half hour shows, with a corresponding decline in 90-minute formats. However, Mr. Starger emphasized that ABC is not planning to reduce its 90-minute programs; the challenge, he said, is to make them attractive. He also announced that ABC had just signed with Universal for 12 hours of Irwin Shaw's

"Rich Man, Poor Man." But, he added, the format has not yet been decided.

Questions, screened and read by HRTS President Paul J. Flaherty (Technicolor Inc.), skirted the season's programming fiascoes, but the subject arose tangentially from time to time, to the extent that Mr. Starger, whose network was hardest hit, especially in its Friday and Saturday programming, commented that there is an admonition there for programmers: Don't be gun-shy about the concepts that didn't make it. The fact that such programs as *The New Land* and *Texas Wheelers* didn't make it should not reflect adversely on the ideas, he said. "The most dangerous thing," he observed, "is to fail to try again with the same good concepts."

It was Mr. Starger who called for more planning for programming. He was asked why orders for episodes had fallen so drastically—from 26 plus 13 some years ago to 13 plus nine today. Mr. Starger used the question to comment: "We know that there are going to be so many new shows that are needed for the season's start in September and again in January. We know we are going to need a supply of programming for those periods. We must begin to plan regularly for September and for January."

Mr. White, asked about NBC's paying a reported \$10 million for a single broadcast of "The Godfather," with only \$6 million in time sold, emphasized that the programming executive's function is to bring the best material to television. "I think," he said, "that in the long run, whatever the cost comparisons are, it may be worth it to bring the best to TV—[in this case] a picture that may become a classic for all times—as soon after its theatrical release as we can."

Program Briefs

Cigar included. Home International Television, Los Angeles, announces TV syndication rights to *Churchill The Man*, one-hour special with commentary by Douglas Fairbanks Jr. and featuring Sarah Churchill, that is being released to coincide with centenary of Sir Winston's birth. Program already has been sold to ABC-owned stations in New York, Los Angeles and San Francisco, and to NBC-owned WRC-TV Washington.

Williams for UT. Tennessee Williams, two-time Pulitzer Prize winning playwright, has been signed by Universal Television to create his first drama for TV, to be produced by Jules Irving, producer of current New York revival of Mr. Williams's "A Streetcar Named Desire."

Benji and Waldo's encore. Lutheran Television, St. Louis, has produced *The City That Christmas Forgot*, half-hour animated color special for holiday showing. Offering is follow-up to Lutheran Television's *Easter Is* and again features Benji and Waldo, animated shaggy boy and dog characters, with voices of Sebastian Cabot, Charles Nelson Reilly and Louis Nye. *Dr. Martin Neeb*, executive producer, LTV, 500 North Broadway, St. Louis 63102.

Wiley, networks tread fine line on sex, violence

FCC chairman, under Hill mandate, looks for voluntary concessions; more meetings slated to consider the various solutions proposed; Senator Brock serves notice he will push for clean-up of TV

For FCC Chairman Richard E. Wiley and the three networks, the pressure is beginning to build. The chairman would like ABC, CBS and NBC to issue a public statement committing themselves to a joint policy containing procedures designed to protect children from programming of "gratuitous violence" or other material considered unfit for them (BROADCASTING, Nov. 25). And the networks do not seem averse at least to the idea of assuring that children will have such protection.

But it is the problems involved in working out mutually acceptable procedures that are giving the networks pause. And among them is the key question of whether the commission, in the person of Chairman Wiley, is not treading dangerously close to the line that separates permissible government action from violation of the First Amendment.

Chairman Wiley says he is sensitive to the danger of the commission taking on the role of censor, and is determined to avoid it. He says he is not opposed to the networks carrying mature and sensitive programming. But he is also under a mandate from the Senate and House Appropriations Committees to report to Congress by Dec. 31 on the actions the commission has taken or has planned to take "to protect children from excessive programming of violence and obscenity."

And the commission has reason to take that mandate seriously. Some members of Congress have been receiving a heavy volume of mail from constituents complaining about sex and violence on tele-

vision. In the House Appropriations Committee hearing on the commission's budget request for 1975 last March, Representative Joseph McDade (R-Pa.) noted that the subcommittee had spent considerable time in previous hearings over the years expressing concern about television violence and children's programming, and added, in quizzing Mr. Wiley, then a new chairman: "I want you to know how strongly we feel. We're going to have a plain shoot-out on this [if the committee is not satisfied by commission action]" (BROADCASTING, March 18).

The committee put the same sentiment in more proper, and more meaningful, language in its report last June. Failure on the commission's part to heed the committee's mandate will result in "punitive action." And last week, a House committee aide confirmed what most observers took that statement to mean: If dissatisfied with the commission's report, the committee would consider cutting the commission's budget.

Nor are the appropriations committees the only source of Hill pressure on the question of sex and violence on television, particularly where children are concerned. Senator John O. Pastore, (D-R.I.), chairman of the Senate Communications Committee which has jurisdiction over the FCC, regularly beats on the commission like a gong, when it appears before him, on the issue of questionable programming. And an aide said the senator's office has received "boxes of letters" from members of the public complaining about allegedly indecent programming.

Chairman Wiley's strategy for dealing with the dilemma in which he finds himself is familiar: Persuade the industry to do voluntarily what the FCC considers to be in the public interest. It worked in the area of children's television programming, at least so far as commercial standards are concerned. But the obstacles to successful implementation are more difficult to overcome.

There is, as some network officials have indicated, the very fact that the strategy has already been successful. They say that

in view of the industry's willingness to cooperate in the area of children's programming, Chairman Wiley's cajoling and coaxing on the matter of sex and violence "are getting close" to becoming a First Amendment problem.

But in the view of network officials willing to discuss the matter, that does not yet seem to be the key issue. As one network source said, "You can't say it's a First Amendment problem yet because nothing was resolved; he just opened up a lot of issues."

The reference was to Chairman Wiley's discussion with the key officials of the three networks—Elton Rule, president, and Everett Erlick, senior vice president and general counsel, of ABC; Arthur Taylor, president of CBS; and John Schneider, president of CBS Broadcast Group; and Herbert Schlosser, president, and David Adams, vice chairman, of NBC—in his office late in the afternoon of Nov. 22.

The meeting does not seem to have been regarded by either side as a High Noon confrontation. The network officials came down to Washington from New York willing to listen, and went home impressed, in at least some cases, with the depth of Chairman Wiley's concern about the issue and prepared to consider some of the proposals he advanced.

The only suggestion to which the network officials are said to have registered strong objection was for a program-rating system, similar to that employed by the motion picture industry for movies. (The suggestion was also the only one reportedly advanced in the meeting by a member of Chairman Wiley's staff rather than the chairman himself.) The officials expressed the view that a rating board existing independently of the networks would draw from the networks too much of their discretion; that, as licensees, they are totally responsible for their product.

A suggestion that the networks submit their material to an outside source for prescreening has been made before. Senator Pastore in 1969 suggested that the networks permit the National Associa-



The squeeze, pass it on. FCC Chairman Richard E. Wiley (l) met with network officials two weeks ago and diplomatically turned up the heat on sex and violence in television programming under (l-r) ABC's Elton Rule, CBS's Arthur Taylor and NBC's Herbert Schlosser.

tion of Broadcasters Code Authority, when it deemed it necessary, to prescreen their product. ABC and NBC were willing to permit prescreening in borderline or special cases, but CBS turned the idea down cold (BROADCASTING, March 31, 1969), and it eventually died.

ABC and NBC are said to have about the same position regarding prescreening today as they did in 1969: occasionally, perhaps; on a regular or systematized basis, never. There is no reason to believe CBS in the last five years has bent any in its opposition to the idea.

Although two other suggestions offered as a means of protecting children from programing meant for adults did not draw the same kind of quick rejection, they did pose problems for the network officials. One was for an elaborate system of warnings; the other, for scheduling certain programs later in the evening.

The warnings might include notations in *TV Guide* and newspaper listings, statements in promotional pieces announcing a program and in spots immediately preceding it, as well as a white dot carried in a corner of the picture to warn those who tune in which a program is under way. As for scheduling, Chairman Wiley suggested that adult programs run at 9 p.m. or later.

One network source indicated he would have no trouble accepting these suggestions in principle so long as all networks did and none was able to obtain a competitive advantage over the other two. (For instance, two networks running low-key, kids-type shows at, say, 8 p.m., would not like to see the third network running a rip-roaring, shoot-'em-up "Dirty Dozen" in opposition.)

And in that connection, there is the problem of defining "violence" and "undue violence," and of distinguishing programing that is unduly violent from that which is simply "action-filled."

There are other problems, too. Warnings could serve to generate interest on the part of children in seeing programs designed for adults. And programs aired at 9 p.m. in New York appear in the Central time zone at 8 p.m.

Furthermore, whatever commitments the networks might be willing to make individually, the chairman's hope of a joint statement might not be realized. One source said the network officials told the chairman at the meeting that policy differences among the networks would make it difficult for them to comply with his proposal.

Each of the networks has its own procedures for warning the audience about material possibly unsuitable for children. And at the Nov. 22 meeting in Chairman Wiley's office, the network officials estimated that notices had been issued in connection with about 20 programs. Some commission officials indicated later this seemed an inadequate performance.

In any event, Chairman Wiley asked the networks to submit copies of the procedures followed by program standards staffs in reviewing programs.

Receipt of the material was to mark the first step in the march to a second

summit meeting. Commission staffers will review the material; and in the meantime, the network officials who met with Chairman Wiley will review the discussion with their respective programs and standard division people and TV network chiefs in an effort to determine whether they regard the proposals discussed at the meeting as feasible. Then, the commission staff and the network's staffs will confer to determine each side's position, and prepare for the next meeting of Chairman Wiley and the heads of the network companies.

Commission officials last week had no definite schedule in mind. But they said they expected to meet with their opposite number on the network side this week. And still to be arranged is a meeting between Chairman Wiley and NAB and NAB code officials. Commission officials indicated that nonnetwork programing also presents problems.

Whether the planned meetings can be held and a resolution reached in time for the commission to prepare its report to Congress seems doubtful. The commission is scheduled to consider a first draft of the report at a meeting on Dec. 11 and to adopt a final report on Dec. 18.

However, Chairman Wiley has indicated he does not feel bound to conclude his talks with the networks before the commission submits its report to Congress. He said following the meeting with the network officials that "we have to continue to probe this situation regardless of the time constraint."

The report to Congress is not the only commission project that cannot be put in final form until the talks with the networks are concluded. Now being drafted is a notice of inquiry and proposed rulemaking dealing with the subject of sex and violence on television.

Nor is the notice all that the chairman is considering. He talked of the issuance of a policy statement, similar to the one the commission issued in the children's programing proceeding, and of the addition of a question in renewal forms calling on stations to state their policies regarding the airing of shows containing sex and violence.

Meanwhile, an indication of the kind of trouble the networks may face on Capitol Hill in the next session of Congress is indicated by work now under way in the office of Republican Senator Bill Brock of Tennessee on legislation aimed at improving the "quality" of programs.

Dr. Harrison Fox, chief legislative assistant to Senator Brock, said the senator has received considerable mail from constituents complaining about local and network programing, including news programs. As a result, he said, the senator began considering legislation that might provide for the creation of an independent commission to prescreen programs and provide the viewers with information to determine whether they want to watch them.

Dr. Fox said the senator is opposed to censorship. But, he added, the senator is "not open" to the networks' argument that the government must not interfere in programing.

ACT picks the best

Boston group confers honors on eight for contributions towards better children's programing

Eight awards to stations and organizations have been announced by Action for Children's Television for "Achievement in Children's Television." This is the third year the Boston-based ACT has given awards for making "a significant step towards upgrading children's television and for eliminating commercialism on children's programs." The winners:

ABC owned-and-operated stations for *Over 7*, a magazine-format program designed for family viewing.

Alphaventure, for *Big Blue Marble*, an ITT-backed series designed to run without commercials.

CBS-TV News for *In the News*, a series of current events reports run between Saturday morning programs.

The Chinese Committee for Affirmative Action in San Francisco for *Yut, Yee, Sahm* (Here We Come), a multicultural program for children.

The Exxon USA Foundation for financial support of Public Broadcasting Service's *Villa Alegre!*, another multicultural and multilingual series.

Prime Time School Television in Chicago for developing and distributing to teachers educational materials on televised prime time specials and documentaries.

WBZ-TV Boston for *Something Else*, a Saturday morning program for 8-to-12-year-olds featuring local children.

WNET(TV) New York for offering a two-week festival of quality daytime children's programing during the mid-year holiday vacations, with the support of the Heckscher Foundation.

'Gilligan's' lessons

It's part of an FM-TV experiment for Philadelphia children that is slated for national use

A meld of noncommercial radio and commercial television has been used successfully in Philadelphia to instruct children, and now its guiding forces plan to go national with the experimental "dual audio-television project."

Dr. Terry Borton of the Philadelphia school board and his associates arranged the link between Kaiser Broadcasting's WKBS(TV) and noncommercial WUHY(FM) both Philadelphia, to "make the 24 hours per week kids spend in front of television educationally useful."

The method is to use established popular TV programing (in the test case it was *Gilligan's Island*) and fitting five to seven minutes of radio narration by Steve Baskevill on radio, into spaces in the televised program to "raise questions, define words, and highlight important material." Announcements in the TV program advise viewers to tune the FM station also.

A two-week survey by the American Research Bureau during experimental broadcasts last spring showed a daily audience of 20,000 (25% of the

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Networks ban sex, violence in prime-time 'family hour'

They also formalize warnings for 8-9 p.m. pre-emptions thought unsuitable for children; NAB code board starts study of general adoption of same rules

The television code review board of the National Association of Broadcasters, at a hastily called meeting in Washington last week, postponed action on CBS's proposal for a TV code modification to restrict the first hour of network prime-time schedules to "family viewing" programs. All three networks announced they would implement the plan on their own.

The TV code board adopted a resolution directing its program standards committee to ponder the matter and report back to the code board at the NAB annual convention the second week in April.

Aside from the "family viewing hour," the CBS proposal urges that the TV code also require all the networks to broadcast and circulate notice to program guide publishers whenever the "family viewing hour" is pre-empted by a special program not meeting the "suitable-for-family-viewing" criterion. Furthermore, CBS proposed that prior notice should also be given for material in other prime-time hours that might be disturbing to a "significant portion" of the adult audience (BROADCASTING, Jan. 6).

According to the code board chairman, Wayne Kearn of KENS-TV San Antonio, Tex., "There was considerable feeling [at the meeting] for what CBS is trying to accomplish." And, said Tom Swafford, vice president of CBS-TV program practices and a member of the code board, "I don't think there was any resistance to the family hour."

But the code board decided to send the proposal to committee to allow the members time to "pause and regroup," in Mr. Swafford's words, before proceeding with a TV code amendment. Mr. Kearn predicted it would not be easy to win a consensus on how to implement the proposal.

Though all seem to agree the idea is

a good one, they foresee problems with definitions and mechanisms. Chief among the open questions is how to define the key phrase "family viewing." Another is how to entice independent stations to go along with the scheme. It would serve no good if the networks are showing programs such as *The Waltons* while the independents are "blowing up the ammunition dump on TV from six to nine every night," one network spokesman said. (The Association of Independent TV stations has no plan to take up the CBS proposal at its convention this week, its president, Herman Land, said last week, although it will be discussed if the question is raised from the floor. He also said that he has not talked with any of the networks or the FCC about the plan yet.)

Another difficulty concerns time zones. In all but the central time zone, the "family viewing hour" would begin at 8 p.m. with the thought in mind that younger viewers would taper off in subsequent hours when program fare would not be restricted to family entertainment. But in the central zone prime time begins at 7 p.m., and some are concerned that when "open season" begins at 8 p.m., many youngsters might still be seated before the TV screen.

All three networks, however, are committed to the general plan, regardless of what the NAB does. NBC announced two weeks ago its plan for a family viewing hour beginning in September, and last week the other two networks followed suit. CBS went on the record at the code board meeting last week as being "irrevocably committed," Mr. Swafford said, and ABC, which was not heard from until last Wednesday, announced that it too will begin the first hour of its prime-time schedule with "programming suitable for general family audiences," effective next season.

ABC's written statement added that when programming during this hour, in its judgment, "contains material which might be regarded as unsuitable for younger members of the family, the audience will be appropriately advised. . . ." The statement said its admonishment to the audience, when necessary, will continue as now, with audio and video advisory announcements at the beginning of the programs and with on-air promotional and print advertising material.

The ABC statement continued, "Government action in the area of program content must be both cautious and carefully limited lest we do permanent damage to the principles of free expression which are so fundamental in our society. . . . Accordingly, ABC strongly supports the concept of industry self-regulation."

It also recounted ABC's standing pol-

icy prohibiting "the use of violence for the sake of violence" and cautioning that the use of force when used in a story line as an appropriate means to an end, "is not to be emulated." With the help of two teams of independent research consultants ABC retains to study the effects of televised violence, the statement said, ABC has found that where violence is portrayed so that its consequences are "adequately depicted in depth," it may have the effect of "reinforcing real-life prohibitions. . . . On the other hand, it is clear that gratuitous violence serves no useful purpose."

As regards the portrayal of sex on television, the statement said, ABC's standards and practices department sees to it that such depiction is not "exploitative and sensational" in made-for-TV films, and the Motion Picture Association of America is approached to re-rate feature films originally rated "R" after ABC has edited them.

The program standards committee of the TV code review board has tentative plans to meet Jan. 28 to discuss the CBS plan. Members of the committee, all present at the code board meeting last week, are Robert J. Rich, KBJR-TV Duluth, Minn.; Alfred R. Schneider, ABC-TV, New York; Herminio Traviesas, NBC, New York; and Mr. Swafford.

Other members of the code board present last week were Mr. Kearn; Harold Grams, KSD-TV St. Louis; Burton B. LaDow, KTVK(TV) Phoenix, and James R. Terrell, KTVT(TV) Fort Worth. Wallace Jorgenson, WBTV(TV) Charlotte, N.C., was absent.

What programs get the bounce when 'family hour' goes into effect?

Network programmers disagree but say they'll be watching one another for transgressions

Industry observers were predicting at least some reshuffling of television schedules in the light of the networks' suitable-for-family-entertainment approach (see story, page 16).

One network programmer said flat out that, looking at the second-season schedule, "ABC bucks these guidelines on every night of the week except Thursday." This source said that four of ABC's 8 o'clock shows—*The Rookies* on Monday, *The Night Stalker* on Friday, *Kung Fu* on Saturday and *The Six Million Dol-*



Family viewing? ABC's *The Rookies* and CBS's *All in the Family*.

lar Man on Sunday—are too violent, and that ABC's Tuesday and Wednesday *Movie of the Week* (both of which start at 8:30 p.m.) too often deal with adult themes or with violent situations to pass muster under any broad family-entertainment guideline.

Answering this charge, an ABC executive admitted that *The Rookies* and the two *Movies of the Week* might have to be scheduled at 9 p.m. or later, but disagreed about *The Night Stalker* and *The Six Million Dollar Man*. (*Kung Fu* is not expected to be back next season.) "These shows are done in a tongue-in-cheek way," he said. "They're like cartoons—no one takes the violence in them at all seriously."

"And as far as I'm concerned," he continued, "CBS's *All in the Family* doesn't fit the guidelines because it deals with controversial themes week-in and week-out. Why should they get away with treating hysterectomy, adultery and bigotry as subjects for comedy at 8 o'clock while we shift successful shows like *The Rookies* into untried later time slots? If we started to suffer competitively in a situation like this, you can bet we'd make a stink about shows like *All in the Family* and NBC's *Sanford and Son*, which often goes in for some pretty raunchy humor."

But another industry executive said that situation comedies are, by their very nature, included in the category of family entertainment. "With the exception of the two abortion episodes of *Maude*," this executive said, "I don't recall any situation comedy's being criticized as unsuitable for family viewing. These guidelines are strictly to shows in dramatic form."

Not so, said another network programmer. "What about the low-cut costumes Cher is always wearing?" this programmer wondered. "If her show is allowed to continue at 7:30 on Sundays next fall, then CBS will be making a mockery of the guidelines." CBS may also have a problem with the sexual innuendos that the *M*A*S*H* (Tuesday, 8:30-9 p.m.) regulars often toss off.

The only certain NBC move, under the proposed guidelines, will be to give the adult-slanted *World Premiere Movie* (Tuesday, 8:30-10 p.m.) a later time period.

"But when you get right down to it," one network executive concluded, "there's an awful lot of hypocrisy going on here. Syndicated shows that are drenched in violence, like *The Untouchables*, will still be turning up as early as 5 o'clock in the evening in many cities. And let's

say we put an adult show on at 9. That still means that the 40% of the country situated in the Midwest will be seeing it at 8. Does this mean that Midwesterners are less sensitive than people in other time zones?"

Escalating costs putting squeeze on TV networks' program suppliers

Study by Wall Street specialist cites need for higher payments to producers; CBS said to be in strongest position

The outlook for TV program producers is bleak unless they get sizable increases in license fees from the networks, and not so good for network TV profits if they do. Ratings-wise, the outlook for ABC is not too good either way.

Those are among the conclusions reached in a 35-page report, "The Television Programming Industry," distributed last week by the Wall Street firm of Tucker, Anthony & R. L. Day. The report was prepared by the firm's Dennis B. McAlpine, a well-known specialist in communications stocks.

Mr. McAlpine thinks the networks can stand higher payments to producers a lot better than producers can stand to stay at current fee levels.

Since "few, if any" program suppliers break even on their network sales and some lose handsomely, he says, "substantial" increases are needed in some cases for survival, and failure to get them could lead to a situation—which he doesn't expect to happen—in which "eventually the number of suppliers will shrink until their bargaining power equals the networks."

On the other hand, he says, "the major question about network profits will be their ability to raise prices at a higher rate than costs. Given the current weak economic outlook for 1975, this ability seems somewhat limited although the more positive outlook for the economy in 1976 does seem hopeful."

Mr. McAlpine's study anticipates that "fees will be modestly increased, if not this year, then in the next two years." Actually, it estimates that network program costs this year will rise 11.6% above the \$681 million estimated for 1974, which was 9% above the FCC-based figure of \$624 million for 1973.

The effect of such increases on net-

work profits, the study notes, would begin to be reflected in the fourth quarter of 1975. But it adds, the impact could be compounded in 1976 by a full or partial repeal of the access rule, and by the costs of presidential election coverage.

The study recognizes that the networks have some alternatives to help keep program costs down, such as less expensive versions of existing shows or a larger number of variety and game shows. But it also recognizes that there are limits to such countermeasures—and probably no chance at all of saving by further increasing the use of reruns—and on the whole it expects program costs to rise "substantially faster than they have in the last few years."

It seems likely, the report continues, that the networks will increase their payments to suppliers, but not enough to give the suppliers a profit. Thus suppliers will "continue to place a great deal of emphasis on eventual domestic syndication," which along with foreign syndication is where their profits come from.

"This means that the supplier will offer his best product to the network that offers him the greatest potential for a long enough run to accumulate sufficient episodes to make domestic syndication viable," the report asserts. "CBS has the best record of keeping a series on network for three years or more, with NBC second and ABC third."

"In fact, at the start of the 1974-75 season, CBS had seven hours of series programming that had been on the network for three or more years, while NBC had six hours, with ABC having one-and-a-half hours. Therefore, if possible, we would expect the program suppliers to continue to favor CBS as a buyer, with ABC as third choice. This assumes that the supplier has his choice of buyer, which . . . is often not the case."

The report also concludes that CBS has some other things going for it and ABC some other things going against it:

CBS, for instance, has obtained almost half (49%) of its prime-time programming over the past four years from independent producers. NBC and ABC have depended almost that much on the major film companies, but NBC has relied particularly on MCA. Far more than either of the other two, ABC has depended on movies (33% of its prime-time hours over the past four years). Moreover, the analysis concludes that demand for series programming will increase as film libraries approach exhaustion and as the networks get more time to fill "once the prime-time access rule is repealed."

What this adds up to, in the report's words, is that:

"... CBS has done an excellent job of founding, developing and nurturing the 'independents.' This tactic has produced several benefits for CBS. It has obviously broadened the universe of program suppliers for not only CBS, but the other networks as well. This has probably had the side benefit of abetting the

Broadcasting Jan 20

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Meeting

NAB TV board jumps just a little through Wiley's hoop

It tells code board to get going on study of sex and violence but sets no date for its own action; big budget adopted, lottery ban is eased in other board meetings

The television board of the National Association of Broadcasters last week accelerated the schedule for television code review board consideration of restrictions on sex and violence in early prime time. It refused, however, to set a firm date for its own action on the matter, as had been proposed by CBS.

The TV board, meeting during week-long sessions of the NAB boards in Palm Springs, Calif., requested the code board to meet on or before Feb. 15 to consider "principles relating to the scheduling of programs in early evening prime-time periods and the use of suitable advisory legends as to the nature of program content." A week earlier the code board had instructed its program standards committee to submit recommendations for the code board's next scheduled meeting in April at the NAB's annual convention in Las Vegas (BROADCASTING, Jan. 13).

The TV board action last week differed somewhat from resolutions offered by Richard Jencks of CBS and Peter Kenney of NBC. Mr. Jencks proposed that the program standards committee of the code board, at a meeting already scheduled for Jan. 28, draft language incorporating in the code "policies consistent with those announced by the networks." Mr. Jencks wanted the code board to meet on or before Feb. 15 to act on the committee draft and the NAB television board to be committed to taking final action at Las Vegas.

Mr. Kenney said NBC favored amendment of the code to reserve the first hour of network prime time for family programs but wanted to clearly preserve the independence of individual broadcasters to judge the suitability of specific shows. He opposed any code takeover of policies networks have each adopted (BROADCASTING, Jan. 13).

Although no resolution draft mentioned the role that has been played by FCC Chairman Richard E. Wiley in the recent consideration of sex and violence, the Feb. 15 date that Mr. Jencks proposed and the board adopted for code board action coincides with the deadline Mr. Wiley has been given for reports to appropriations subcommittees in the Senate and House (BROADCASTING, Jan. 6). At a meeting Mr. Wiley held with the heads of television networks and the top officers of the NAB on Jan. 9, the heat was put on the NAB to move faster than its code review board had proposed.

Before the Jan. 9 meeting the networks had announced policies reserving the first hour (8-9 p.m.) of prime time for programs suitable for "family viewing." They also promised to broadcast and publicize warnings of programs containing material that might be found offensive. Mr. Wiley was said to have suggested that all prime time before 9 p.m. be reserved for family viewing. Beyond that, he expressed concern that independent stations would not be affected by network policies.

The resolution adopted by the TV board last Wednesday was drafted by the NAB staff and was offered by Eugene Cowen of ABC. It commended the three television networks "for their individual actions with respect to programming in the initial hour of network prime time" and then asked the code board to meet by Feb. 15 to consider whether code action should be taken.

The resolution added: "In recognition of television's exceptional potential for reflecting the dynamics of attitudinal change in society, the board urges all broadcasters—both networks and stations—to exercise a high degree of responsibility in the program service provided in early evening prime time. Likewise, appropriate advisories for other segments of the broadcast schedule should be given serious consideration by every television station."

Vincent T. Wasilewski, NAB president, was reported to have telephoned Mr. Wiley to read the resolution after it had been passed. Mr. Wiley withheld immediate comment.

In other actions, the television board voted amendments in the code to permit advertising of legal lotteries and pari-mutuel and off-track betting. The lottery amendment, repealing what had been a prohibition against such advertising, followed President Ford's signing of a bill that amended antilottery laws to permit the broadcast of information about state-run lotteries (BROADCASTING, Jan. 6).

The NAB TV board adopted code language that reads: "The lawful advertising of governmental organizations which conduct legalized lotteries is acceptable provided such advertising does not unduly exhort the public to bet."

On the advertising of other legalized gambling, the code was amended to read: "The advertising of private or governmental organizations which conduct legalized betting at sporting contests is acceptable provided such advertising is limited to institutional announcements which do not exhort the public to bet."

It was noted that the lottery provision was somewhat more liberal on advertising content than the other new amendment. It was also noted that "sporting contests" applied to legal gambling at such events as jai alai or dog racing in Florida, as well as horse racing anywhere it is legal. The action on lotteries came on appeal by various state lottery organizations (13 states have legal lotteries now). The board also listened to a presentation by a delegation from the New York Off-Track Betting Corp., including Howard Pearson of OTB's agency, Lois Holland Callaway.

The TV board also reaffirmed its adoption of the principle of mandatory code membership for all NAB members: this support was registered on a voice vote, with only a scattering of nays, it was

Budget going up. Directors of the National Association of Broadcasters last week adopted a general budget of \$3,573,000 for the fiscal year beginning next April 1, a \$171,124 increase over fiscal 1974-75. In addition, they budgeted television code operations at \$664,500, a \$21,600 increase over the current fiscal year, and radio code operations at \$238,000, a \$5,000 increase.

It was also revealed that a deficit of \$308,034 is projected for fiscal 1974-75, in large part traceable to the discrepancy between the \$366,461 spent by the NAB's special committee on pay TV and the \$146,490 collected in a special fund-raising drive to support the committee. In the new budget, the committee, which has been given permanent status, is budgeted at \$200,000.

Dues increases from television stations are expected to raise their contribution by \$105,000 over the present fiscal year, to \$1,090,000. Radio dues are expected to reach \$1,465,000. Net income from associate members is budgeted at \$150,000, a \$3,000 decline. The annual convention is expected to adduce \$367,500 next April, a \$39,314 gain over the convention in Houston last year. Rentals in the NAB's Washington headquarters building will bring in \$144,000.

understood. But because there has been substantial opposition to this requirement by many smaller television broadcasters, the board instructed the NAB staff to send a letter to all TV broadcasters asking for their feelings on the matter and agreed that there should be a special TV board meeting the day before the regular June meeting at which the TV board, plus a representative group of TV code members could meet with and hear from interested TV licensees opposing the mandatory requirements that are scheduled to go into effect April 1, 1976.

The TV board also accepted a recommendation by the ad hoc committee on membership that TV dues be raised from the current 20% of the highest hourly rate to 22%. This is expected to bring in some \$100,000 extra from TV members. The TV board also agreed to the continuance of the special committee that is expected to consider restructuring of the TV dues schedule perhaps more like the radio dues structure which brings in more than \$1.4 million. TV, it is said, brings in just less than \$1 million. Any report on restructuring TV dues is expected to be considered at the June board meeting.

Among other highlights of the NAB board meetings, as of Jan. 15:

- Wayne Kearn, KENS-TV San Antonio, Tex., was reappointed chairman of the TV code review board. And Harold Grams of KSD-TV St. Louis was reappointed to that group for a second, two-year term.

- Changes in the wording of the TV code's provisions regarding children's programming were adopted by the TV board as recommended by the code review board last October. These involve such matters as calling for more cultural programs, less violence and a prohibition on a host or leading character appearing in commercials to sell the product to children.

- Named as a regular standing committee the present ad hoc pay TV committee, with Richard Stakes of the Evening Star stations, Washington, as its chairman. Willard Walbridge of Capital Cities Broadcasting, Houston, the present chairman of that committee, asked to be relieved because of other duties. Mr. Walbridge was recently elected chairman of the Houston Chamber of Commerce and to the national board of the Red Cross. The TV board passed a resolution commending Mr. Walbridge for his leadership.

- A continuation of support for same-day nonduplication requirements for CATV systems was voted by the TV board, as requested by Rocky Mountain broadcasters. The FCC has been considering changing same-day nonduplication in that area to the simultaneous nonduplication that prevails in other parts of the country.

- In a move directed at various engineering proposals for the use of TV transmissions for other purposes, the TV board passed a resolution declaring that ancillary TV signals must not be visible, or audible, or degrade the TV picture.

- Earlier the joint board accepted a proposal by A. James Ebel, KOIN-TV

Lincoln, Neb., that it begin preparing for the 1979 World Administrative Radio Conference by establishing liaison with U.S. officials to participate in formulating U.S. position.

- And, after a surprising lengthy discussion, at a joint radio-TV board meeting on Tuesday, authorization for the annual contribution of \$6,000 to the Inter-American Association of Broadcasters was bucked to the executive committee. Some members raised questions about the use of the funds.

Although the NAB failed, by fluke some say, in getting a new license renewal bill through the 93d Congress, the consensus among board members meeting in Palm Springs last week was that the staff deserved commendation. And that is exactly what joint board members did early last week, unanimously passing a resolution offered by Thad M. Sandstrom of WIBW(AM) Wichita, Kans.

The library chat: Ford takes White House TV into new dimension

With aid of television adviser Bob Meade, President nets a plus for well-rehearsed informality in pre-State of the Union economy talk

President Ford, who for most of his six months in office has been having trouble making the big impression on the American public—at least the big, favorable impression—last week combined careful preparation and an innovative approach to the use of television in an effort to do something about that problem.

The occasion was one of critical importance to his Presidency. He was delivering an extraordinary pre-State of the Union address that was in part designed to keep the spotlight on his plans for aiding the economy—and off any of the Democrats'.

The format seemed designed to capture the spirit, at least, of President Roosevelt's radio fireside chats. When the camera revealed the President, at 9 p.m. Monday, he was not sitting at a desk in the Oval Office, the pages of his text in hand, a fixed smile on his face. Rather, he was in the White House library, standing with White House Chief of Staff Donald Rumsfeld and News Secretary Ronald Nessen. After a moment, the aides moved off camera and the President, with the colored bookbindings providing a warm background, looked straight into the camera, as if into the eye of the viewer at home, and talked about the economic and energy-related problems facing the country—and in language designed to impact on an audience of laymen, not economists.

Part way through his 18-minute address, he sat down at the desk. At times, particularly in the opening moments, he seemed not quite to know what to do with his hands. But Robert Mead, the

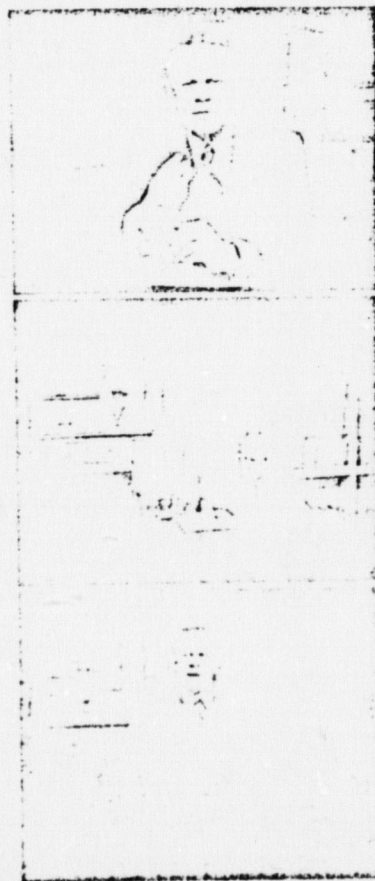
former CBS News producer who as the President's television adviser was responsible for the production of the broadcast, proclaimed himself "very pleased" with the results. The President was pleased, too, Mr. Mead said. And, he added, the calls from the outside—including those from "people in the business"—were favorable.

The format reflected Mr. Ford's willingness, indeed eagerness, to try new techniques in communicating with the public. It reflected too the presence on the White House staff of men skilled in the arts of using television.

Several weeks ago, the President asked Mr. Mead to check out rooms in the White House for their suitability for television. Later, he indicated he was not always happy with the lights the networks used in covering him live; they hurt his eyes.

Mr. Mead got busy and in time found several rooms he felt would be satisfactory as settings for different kinds of television appearances—the library among them. Then, two weeks ago, he hired a CBS camera crew so that the President could try out ideas he, Mr. Mead, was suggesting. He wanted "the proper atmosphere" for the experimentation, Mr. Mead said last week.

The crew set up in the library, and the President began going through the motions of a speech, simply using material lifted from newspapers for text. One problem that developed was with the Teleprompter, which had been left over from Lyndon Johnson days: President Ford was unable to read from it without his glasses. Mr. Mead tried other systems, and



CBS News photos

Broadcasting Feb 10

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Wholesomeness to be the rule at 7-9 p.m.

TV code board votes amendment
that Wiley tentatively approves
with assurance FCC won't lift it
as it did children's time standards

When only the week before there had been sharp divisions of opinion, the television code review board of the National Association of Broadcasters reached near unanimity last week in voting to make industry-enforced scheduling of family entertainment during evening prime time a part of the television code.

But unlike original proposals which called for one hour of "family viewing" nightly, the proposed code amendment calls for two. If the change is ratified by the NAB television board, as it is expected to be during the Las Vegas convention in April, the code will prohibit all code subscribers from airing programming that is "inappropriate for viewing by a general family audience" during the first hour of the network prime-time schedule "and in the immediately preceding hour." That means that beginning with the new fall season in September, when the code amendment would become effective, all code subscribers must show programs suitable for family viewing from 7 p.m. to 9 p.m. nightly.

In addition, the proposed code amendment provides for the use of advisories of two types—one for programming shown during the family viewing period, but deemed inappropriate for the family audience, and the other for programs in later prime-time periods which "contain material that might be disturbing to significant segments of the audience."

The advisories in both instances, the proposed amendment provides, should be presented in audio and visual form at the beginning of the program and at a later point "when deemed appropriate." Furthermore, they should be used "responsibly" in advance promotional material. Finally, when an advisory is called for, the broadcaster should attempt to notify publishers of TV program listings.

Following the TV code board action the participants were giving themselves high marks for their work. Tom Swafford, vice president of CBS-TV program practices and a member of the code board, called the proposed amendment

"ideal self-regulation." And he said, "This is quite a statesmanlike move by the industry." But it is also a response to the persuasions of FCC Chairman Richard E. Wiley, who has been under pressure from Congress to explain what is being done to reduce sex and violence in television programming (see page 66).

Although Mr. Wiley had not studied the proposed code amendment last Wednesday, he said it appeared to represent a "constructive step." He said he does not know whether there are any "holes" in the document, but that it seemed to him to cover the key requirements—it is to be incorporated in the industry's code and it covers how on-air and published warnings should be handled.

Mr. Wiley was asked whether the FCC might try to incorporate the proposed code amendment as an FCC rule or in the license renewal form, as it did with code amendments on commercial time standards in children's programming. "I don't see that happening," the chairman said. "It hasn't been discussed." He added that time standards are quantifiable, whereas the family viewing concept is not. He said it is important to put the family viewing concept in the code because the government cannot say what is or is not family viewing. "We'll depend on the good faith of broadcasters," Mr. Wiley said.

Meanwhile, Mr. Wiley said, the FCC is currently preparing its report to Congress, as requested by appropriations subcommittees in both houses. Due in mid-February, the report will include a history of action the commission has taken on broadcast violence, sex and obscenity and will relate what the commission has proposed since Chairman Wiley began negotiations with the networks (BROADCASTING, Dec. 2), what the industry's response has been and what the commis-

sion will do in the future.

The drafters of the code amendment are careful to note that the "good faith" of broadcasters which Mr. Wiley said he is counting on will indeed be critical to the operation of the plan. Decisions on what does not qualify as family viewing will be those of the individual broadcasters.

As it does now, the NAB Code Authority will have the power to handle complaints and review and monitor programs of code subscribers, but not to exercise prior restraint, according to the TV code board chairman, Wayne Kearl of KENS-TV San Antonio, Tex. He said last week that "It was the sense of the meeting that prescreening wasn't the ticket." It would be difficult to square prescreening with the First Amendment, he said.

Although the participants in the proposed code amendment considered it a victory of sorts, they did not pretend that implementing the plan will be easy. For one thing, disagreements are bound to develop over whether the "other broadcaster's" programming during the family viewing period qualifies as family fare. The proposed code amendment purposely included no definition for family viewing.

According to Mr. Kearl, that issue was not ducked by the code board. For himself, he said, "I don't believe it is possible to arrive at a specific definition." And he added: "If you attempted a more rigid definition, you would still have differences of opinion."

Other code board members agreed. Mr. Swafford said that although he anticipates problems over definitions, the "instincts of most broadcasters are good and decent. I don't think you're going to see anybody willfully abusing the spirit of what the code board has done." The CBS statement Mr. Swafford brought

The 'family viewing' standard. Following is the language that the National Association of Broadcasters television code review board has recommended for insertion in the code at the end of the section headed "Principles Governing Program Content":

"Additionally, entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment program in this time period is deemed to be inappropriate for such an audience, advisories should be used to alert viewers. Advisories should also be used when programs in later prime-time periods contain material that might be disturbing to significant segments of the audience.

"These advisories should be presented in audio and video form at the beginning of the program and when deemed appropriate at a later point in the program. Advisories should also be used responsibly in promotional material in advance of the program. When using an advisory, the broadcaster should attempt to notify publishers of television program listings."

The provisions would become effective with the new season beginning next September.



Codifiers. Seated at the Washington headquarters of the National Association of Broadcasters last Tuesday are members of the television code review board and staff, architects of the plan to incorporate a nightly family viewing period in the TV code. Clockwise around the table from the left: James R. Terrell of KTVT(TV) Fort Worth; Burton B. LaDow, KTVK(TV) Phoenix; Alfred R. Schneider, ABC-TV; Robert J. Rich, KBJR-TV Duluth, Minn.; Jerome G. Lansner, assistant director of the NAB Code Authority; Wayne Kearn, KENS-TV San Antonio, Tex., code board chairman; Stockton Helffrich, director of the Code Authority; Tom Swafford, CBS-TV; Herminio Traviesas, NBC; Harold Grams, KSD-TV St. Louis. In the background is John Summers, general counsel of NAB. Wallace Jorgenson, WBTV(TV) Charlotte, N.C., was absent.

to the code board meeting last week said in part that "out of actual broadcast practice . . . a living definition will gradually emerge which will be subject to constant public scrutiny."

Herminio Traviesas, NBC's vice president for broadcast standards, also brought a written proposal from NBC to the meeting last week. It said programs broadcast during family viewing periods should be suitable to "this family atmosphere which includes children's viewing." It said further, "The suitability of a program for its time period involves consideration of its subject matter, composition of audience, manner of treatment, whether the portrayal deals with fiction, fantasy or contemporary reality, and similar factors calling for case-by-case judgments."

Then there is the problem of enticing independents into the family-viewing fold. The vote on the final language of the proposed code amendment was 6-to-1, with one dissent cast by James R. Terrell of KTVT(TV) Fort Worth, Tex., chairman of the Association of Independent Television Stations (INTV). Mr. Terrell said last week that his "no" vote did not necessarily mean that INTV will refuse to go along with the change if it is ratified. "But certainly we're going to take a close look," he said. He indicated that the INTV board will probably confer on the question in the near future.

Mr. Terrell said he felt the TV code was already explicit in its admonishments on sex and violence and that he would have instead supported a statement of principle from the code board. But he specifically objected to family viewing being restricted to a particular time period. After all, he said, "early evening is the independent's prime time." And, he added, since off-network material is the independent's primary programming source, in two or three years independents will be getting "the present

crop" of network programs, some of which "probably caused the present concern" with violence and sex.

Early reaction from other quarters was varied. Frank Price, president of Universal Television, told a luncheon of the International Radio and Television Society in New York last Wednesday that the whole idea of family viewing "smacks of censorship."

But reaction from program syndicators interviewed last week was milder. Henry Gillespie, senior vice president of Viacom Enterprises, indicated his company will be able to adjust. He said Viacom has posed two approaches he considers workable—to simply eliminate offensive episodes of long-running series (probably only a few in most cases, he said) or to edit out scenes that might be regarded as extremely violent or distasteful.

Mr. Gillespie said Viacom has done some exploratory work in the editing room on a series he would not disclose and discovered that episodes rarely required more than a minute of excision to be made acceptable for family viewing.

Kevin O'Sullivan, president and chief operation officer of another syndicator, Worldvision Enterprises Inc., made similar comments. He said that each episode in series such as *The Rookies* or *Hawaii Five-O* should be judged on its own merits, and "if there are excesses in that individual episode, then the station could run a disclaimer with it. Or the station could edit out any scenes" it finds objectionable. He said he doesn't think any series is barred from family viewing, that if whole categories of programs such as police shows are excluded from early fringe time on stations, "we're well on the way to censorship."

FCC Commissioner Abbott Washburn, also a panelist before the IRTS luncheon last week, called the code board action "a fine forward step," and a "good leadership move on the part of the in-

dustry." But then he proceeded with a criticism of recent network shows and revealed his attitudes on what family viewing ought to mean. Among the programs he did not like were NBC's November telecast of "The Godfather" and its recent *Columbo* melodrama about devil cult and CBS's presentation of *Kojak* episode during which "a deranged Vietnam veteran throws five different people out of a window." Mr. Washburn characterized the content of these telecasts as bordering on "violent material for its own sake. . . rather than for reasons of artistic integrity." He said further that "high tension crime dramas" take up to 21 hours of evening time on the networks every week and that this kind of material could "lead to antisocial behavior" by "unstable" people and people "predisposed to crime."

For themselves, the networks were reluctant to project the effects of the proposed code amendment on their own programming, although Robert T. Howard, president of NBC-TV, said the only current programming NBC might have to change is Tuesday at 8:30, when the adult-oriented *World Premiere Movie* is scheduled. Officials of CBS and ABC said they were not prepared to say what effect the code board's action might have on them.

An ABC-TV official suggested, however, that each network may ultimately be guided in its decisions by what the other networks seem to be taking—if only for competitive reasons. "We have to make our own decisions and interpretations in good faith," he said, "but I'm curious to see how it's interpreted by the industry too."

It was by no means certain at the start of the code board meeting last Tuesday that an amendment to the TV code would be agreed upon, and when it became clear that not just a majority but a "clear majority" favored that step, "I surprised the hell out of me," said Mr. Kearn.

In the end, reportedly, it was NBC whose action "cleared the logjam" of conflicting proposals and NBC whose proposal became the core of the final amendment. The NBC proposal, in some respects similar to that of CBS, which initiated the movement for code amendment, was put in broader, more general terms. It stated that (1) programming inappropriate for viewing by family audiences should not be broadcast through the first hour of network prime time, (2) audience advisories should be used for exceptional cases where programs in early evening are inappropriate for family viewing and for later adult programming which might be offensive to significant segments of the adult audience and (3) the broadcaster should have "initial and primary responsibility" for making these programming judgments, guided by the code's spirit and letter.

The ABC representative, Alfred Schneider, vice president of ABC-TV broadcast standards, had no proposal drafted at the start of the meeting, but along with Messrs. Swafford and Traviesas and Robert Rich of KBJR-TV Duluth,

Minn. (who made up the code board's program standards subcommittee), had a hand in drafting the final language.

Among concerns that threatened to send the whole issue back to subcommittee, according to Mr. Kearl, was the problem of the inconsistency between prime time in the Eastern time zone, where the family viewing period would end at 9 p.m. and the central time zone where it would end one hour earlier, while youngsters might still be watching TV. The dispute was settled, however, when Mr. Kearl suggested that viewers in the central time zone are accustomed to their different schedule.

Another major concern was that the advisories used to warn viewers might have the effect of titillating viewers, particularly younger ones, thereby attracting them to the very shows they are being advised against watching. Afterwards, Mr. Traviesas told the IRTS luncheon one of his main concerns will be "that we not use advisory legends as a crutch." He said also that the family viewing concept would impose "a big new responsibility on the heads" of the networks' censors.

ABC volunteered two observations after the code board action in a statement that announced its support of the plan: first that to be effective it must be implemented on an industrywide basis, "not merely in prime-time network programming," and second, that both industry and government must be wary of the "real danger" of "more and more regulation" concerning program content. "If such regulation results in any lessening of the broadcasters' freedom of expression, the public will be the ultimate loser," the ABC statement said.

Constitutionality of PTAR exemption expected to be key issue in fight

First round to take place tomorrow in New York appeals court where NAITPD starts what may be battle right up to the Supreme Court

"It's going to be," said the network lawyer referring to the new court fight building up over the FCC's third attempt at a prime-time access rule in five years, "a Donnybrook."

And it will not be long before that prediction is tested. The U.S. Court of Appeals in New York will hold a hearing Tuesday on a petition by the National Association of Independent Television Producers and Distributors for a stay of one provision of the new rule (BROADCASTING, Feb. 3).

By last week, the parties that will participate in the case were, for the most part, known. And their filings were a potpourri of similar and conflicting interests.

But it seemed clear that the constitutionality of the rule would be a major is-

The power of Cosell. A *New York Post* survey of police records in that city shows that during the 16 Monday nights when ABC's *Monday Night Football* was aired, arrests dropped approximately 20% below totals recorded on the Mondays before the series began. The only lower rate was recorded on Mother's Day. The decline in arrests on football nights was in the nonfelony categories only, such as drunkenness, prostitution, and disorderly conduct. The *Post* report speculated that the reason behind the drop was an unwillingness by police to go through the lengthy arrest and arraignment process, and thereby miss games themselves. Police officials sharply denied this.

sue, one that might finally be submitted to the Supreme Court for resolution. Some opponents and supporters of the rule seemed in agreement that the provision of the rule on which NAITPD is seeking a stay violates the First Amendment.

The provision at issue exempts children's programming, public affairs and documentaries from the rule's restriction limiting top-50 market affiliates to three hours of network programming in prime time. NAITPD, which supports the rule generally, contends that the exemption, besides violating the First Amendment, permits the networks to recapture 100% of access time. It also says the uncertainty it contends the exemption will cause in the programming market makes the effective date, September 1975, unreasonable early.

To CBS, the exemption raises First Amendment questions that taint not only the exemption but the rule itself. Although the appeals court in New York upheld the original prime-time rule as constitutional, CBS said, "The commission's manifest and announced intention to scrutinize programming under the rule and to pass judgment on whether particular programs 'will best serve the interests of the public' presages the kind of involvement in the day-to-day functioning of broadcasters which the Supreme Court has held to be inconsistent with the basic values of the First Amendment."

Several lawyers saw in the statement, filed with the court, a determination on CBS's part to fight the constitutionality battle all over again, and up to the Supreme Court, if necessary. CBS had originally filed its appeal from the rule in the appeals court in Washington, presumably, some lawyers said, because of what seems to be that court's newly found interest in First Amendment issues. However, since NAITPD had filed a day earlier in the New York court, the case will be argued there—as were the appeals taken from both PTAR I and II.

CBS took no position on the stay requests in the statement it filed. But it is going to find itself at odds with the other two networks on the merits of the case. Both NBC and ABC will support the rule. NBC is also supporting the FCC in its opposition to the request for stay.

CBS will find at least six major program producers on its side. Warner Bros., Columbia Pictures Industries, Twentieth Century-Fox, United Artists, MGM Television and MCA filed a joint notice of appeal, and they are expected to urge the First Amendment argument in requesting the court to overturn the rule. The producers are also opposing the position for stay but are requesting an expedited consideration of the case.

Lining up on NAITPD's side are Westinghouse Broadcasting Co. and Sandy Frank Film Syndication. Westinghouse, which had originally offered the proposal that became the prime-time rule, and Sandy Frank favor the basic rule and will oppose the exemption on appeal. Group W will not take a position on the request for stay but Sandy Frank, which had urged the commission to set September 1976 as the effective date, will support NAITPD on that issue.

Lurking in the background of the developing court fight is the prediction of FCC Chairman Richard E. Wiley, who has made no secret of his dislike of the rule, that if the court sends it back to the commission, the commission will not attempt to perfect it but will repeal it (BROADCASTING, Jan. 20). And a number of other commissioners who voted for the latest version did so without much enthusiasm and might well vote against the rule if it comes up before them again.

Such conjecture does not seem to concern backers of the rule who are challenging the exemption. Katrina Renour, counsel for NAITPD, says the commission could not simply turn its back on a rule it has already defended in court as being in the public interest.

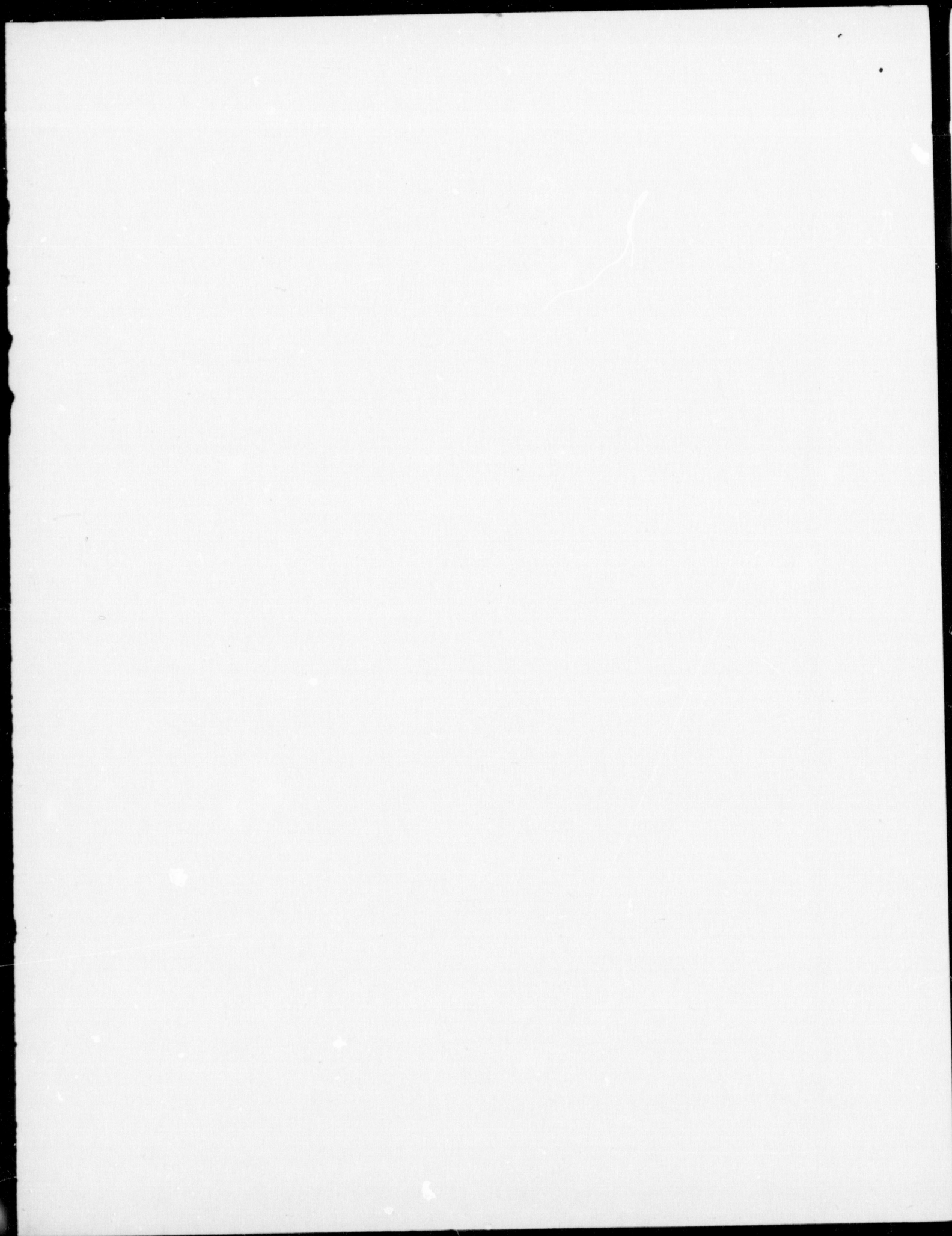
OTP wants to know how much government is in public broadcasting

Agency sends questionnaires to executive department to find out what they spend to finance noncommercial programming

The Office of Telecommunications Policy is circulating a questionnaire among government departments and agencies aimed at determining whether and to what extent they use noncommercial broadcasting stations "in excessive or inappropriate attempts to reach the public."

Eleven executive departments and 12 other executive agencies are asked to respond by March 14 to such questions as whether they support the production of programming intended for use on noncommercial stations and, if so, what form that support takes and what authority permits them to engage in such activity.

OTP also asks for a list of the elements within each department that fund noncommercial broadcast programs, and how much money the departments and agencies have spent on noncommercial radio and television programming in each fiscal year dating back to 1972. Further more, it asks for copies of the contract through which funds were provided to the noncommercial programming, as well



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Thursday, February 20, 1975

February 19, 1975 - G

FCC ISSUES REPORT ON VIOLENCE AND OBSCENITY ON TELEVISION

The Federal Communications Commission made public today its Report on the Broadcast of Violent and Obscene Material.

The report, a study of solutions to the problems of televised violence and sexually-oriented material, was undertaken by the Commission at the request of Congress in mid-1974.

The Commission's study focused on two issues:

- steps that might be taken to prohibit the broadcasting of obscene or indecent material, and

- steps that might be taken to protect children from other sexually-oriented or violent material that might be inappropriate for them.

The report concluded that with regard to obscene and indecent material, direct governmental action is required by statute, and, the Commission said, it intends to meet its responsibilities in this area.

Specifically, the Commission said it would submit to Congress an amendment to Title 18, U.S. Code, Section 1464, to eliminate the uncertainty as to whether the FCC has jurisdiction over the broadcasting of obscene or indecent material on television. The prohibition would extend to cable television as well, the Commission said.

As to the broader question of what is appropriate for viewing by children, the FCC concluded that self-regulation by the broadcast industry was preferable to the adoption of rigid Federal standards.

The Commission said recent actions by the three television networks and the National Association of Broadcasters Television Code Review Board establishing a "family viewing" period during the first hour of prime time were "commendable and go a long way toward establishing appropriate protections for children from violent and sexually-oriented material."

(over)

The adoption of Federal rules, the Commission said, might involve the government too deeply in programing content and raise sensitive First Amendment questions.

In addition, the Commission said, any rulemaking designed to limit violent and sexually-oriented programing that was neither obscene nor indecent would require finding an appropriate balance between the need to protect children from harmful material and the adult audience's interest in diverse programing.

Such regulatory action, the report noted, could risk improper government interference in sensitive, subjective programing decisions, freeze present standards and discourage creative developments in the medium.

FCC Chairman Richard E. Wiley, in a recent speech to the National Association of Television Program Executives in Atlanta said:

"Short of an absolute ban on all forms of 'violence' -- including even slapstick comedy -- the question of what is appropriate for family viewing necessarily must be judged in highly subjective terms... Indeed, the lack of an acceptable objective standard is one of the best reasons why -- the Constitution aside -- I feel that self-regulation is to be preferred over the adoption of inflexible governmental rules."

The FCC is required by the Communications Act to ensure that broadcast licensees operate in a manner consistent with the "public interest," and Commission policy has long held that program service in the public interest is an essential part of a licensee's obligation.

At the same time, however, Section 326 of the Act specifically prohibits "censorship" by the FCC and expressly forbids promulgation of rules or conditions "which shall interfere with the right of free speech by means of radio communications."

The report noted that for this reason the Commission historically had exercised caution in program regulation.

With all these considerations in mind, Wiley last November 22 initiated discussions with executives of the television networks.

Among those attending the first meeting were Arthur Taylor, president, CBS Inc., and John Schneider, president, CBS Broadcast Group; Herbert Schlosser, president, NBC, Inc., and David Adams, vice chairman, NBC, Inc.; Elton Rule, president, ABC, Inc., and Everett Erlick, senior vice president and general counsel, ABC, Inc.

The chairman suggested several specific proposals--a new commitment to reduce the level and intensity of violent and sexually-oriented material, the scheduling after 9 P.M. of programing inappropriate for young viewers, the broadcast of audio and video warnings when such programs are broadcast and advance warnings in print media program listings and promotional material.

The chairman also raised the possibility of adopting a rating system similar to that now used by the motion picture industry.

CERTIFICATE OF SERVICE

I, Kenneth A. Cox, hereby certify that copies of the foregoing BRIEF FOR THE PETITIONER SANDY FRANK PROGRAM SALES, INC., ORDER FOR PERMISSION TO FILE BRIEF EXCEEDING PAGE LIMIT, and AFFIDAVIT IN SUPPORT OF PROPOSED ORDER FOR PERMISSION TO FILE BRIEF EXCEEDING PAGE LIMIT were served this 21st day of February, 1975, by mailing true copies thereof, by United States mail, postage prepaid, to the following parties:

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No commitments were sought from the networks and none were offered but the report noted that the meeting provided an opportunity for a free and candid exploration of a mutually recognized problem affecting broadcast service.

While not all the proposals advanced by the Commission were acceptable to the networks, each developed a set of guidelines it felt should govern its programming and each released to the public policy statements incorporating these guidelines.

Common to all three statements was the network's assurance that the first hour of network entertainment programming in prime time would be suitable for viewing by the entire family.

At a second meeting January 10 in which representatives of the National Association of Broadcasters joined Wiley and the network officials, each network made it clear that programs presented during the "family viewing" period would be appropriate for young children. Proposals that reforms be incorporated in the NAB Television Code were also discussed.

On February 4, the NAB Television Code Review Board adopted a proposed amendment to the NAB Television Code. Similar to the networks' guidelines, the code would expand the "family viewing" period to include "the hour immediately preceding" the first hour of network programming in prime time.

The new proposal would go into effect this September but first must be approved by the NAB Television Board, which will meet in April. The Commission said it had no reason to expect the board would reject the proposal. It added that it anticipated discussing the same issues with the Association of Independent Television Stations and with educational broadcasters.

In sum, the three network statements and the NAB proposed policy would establish the following guidelines for the Fall 1975 television broadcast season:

-- the first hour of network entertainment programming in prime time and the immediately preceding hour would be designated as a "family viewing" period. This would, in effect, include the period between 7 and 9 P.M., eastern time during the first six days of the week. On Sunday, because network programming typically begins at a different time, the "family viewing" period would begin half an hour earlier.

-- "viewer advisories", or warnings, would be broadcast in both audio and video form "in the occasional case when an entertainment program" broadcast during the "family viewing" period contained material that might be unsuitable for young audiences. "Viewer advisories" also would be used in later evening hours for programs containing material that might be disturbing to significant portions of the audience.

-- broadcasters would attempt to alert publishers of television listings as to programs containing "advisories" and would urge responsible use of such warnings in promotional material.

(over)

The report noted that the network and NAB proposals had been designed to give parents general notice that after the evening news, and for the duration of the designated period, the broadcasters would make every effort to assure that programing presented -- including series and movies -- would be appropriated for the entire family.

However, the report pointed out, "parents, in our view, have -- and should retain -- the primary responsibility for their children's well-being. This traditional and revered principle...has been adversely affected by the corrosive processes of technological and social change in twentieth-century American life. Nevertheless, we believe that it deserves continuing affirmation."

The Commission said it recognized specific aspects of these industry self-regulation measures might meet with some disagreements. The "family viewing" period would be presented at different hours in different time zones and ordinarily would end at 9 P.M. in New York, at 8 P.M. in the Midwest, and as early as 7 P.M. in parts of the Mountain Time Zone. In addition, the fact that the "family viewing" period may be presented at a different time on Sunday could create some confusion.

The Commission also noted that "program advisories" and other warnings should not be used in "a titillating fashion so as to commercially exploit the presentation of violent or sexual-oriented material." It added that the new guidelines would not be acceptable to the public if broadcasters "prove to be unreasonably expansive in deciding which programs are appropriate for family viewing."

Despite these considerations, the Commission concluded, the new guidelines "represent a major accomplishment for industry self-regulation." It expressed optimism that they would be applied in a reasonable manner that would be acceptable to the American people.

Turning to the FCC's statutory responsibilities regarding the broadcast of obscene and indecent material, the Commission said Title 18, U.S. Code, Section 1464, which prohibits utterances of "any obscene, indecent or profane language by means of radio communications" might be inadequate for the purpose of prohibiting explicit visual depictions of sexual material.

Consequently, it said, it would include in its legislative proposals to the 94th Congress an amendment to Section 1464 that would eliminate the uncertainty as to whether the FCC had statutory authority to proceed against video depiction of obscene or indecent material. The proposal would extend the prohibition to cable television as well.

The report noted that in a related step the Commission also had clarified its position on the broadcast of indecent language in a declaratory ruling issued February 12 in a case involving WBAI(FM), New York City.

That ruling related the new definition of "indecent" to the use of language that describes, in terms patently offensive as measured by contemporary community standards for broadcast media, sexual or excretory activities and organs at times of the day when there was a reasonable risk children might be in the audience.

The Commission concluded with the hope that the combined effects of the declaratory order and the proposed amendment to the U.S. Code would clarify the broadcast standard for obscene and indecent speech as well as visual depictions and would prove effective in abating problems that had arisen in these areas of programing.

